

o. 85-495-CFX
tatus: GRANTED

Title: Ansonia Eoard of Education, et al., Petitioners
V.
Ronald Philbrook, et al.

ocketed:
eptember 20, 1985

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Sullivan, Thomas N.

Counsel for respondent: Rosen, David N., McWeeny, Robert F.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY
AT THE TIME OF FILMING. IF AND WHEN A
BETTER COPY CAN BE OBTAINED, A NEW FICHE
WILL BE ISSUED.

ntry	Date	Note	Proceedings and Orders
1	Aug 13 1985		Application for extension of time to file petition and order granting same until September 25, 1985 (Marshall, August 19, 1985).
2	Sep 20 1985	G	Petition for writ of certiorari filed.
3	Oct 23 1985		DISTRIBUTED. November 8, 1985
4	Nov 5 1985	X	Brief of respondent Ronald Philbrook in opposition filed.
5	Dec 12 1985		Brief of respondent Ansonia Federation of Teachers in opposition filed.
6	Dec 18 1985		REDISTRIBUTED. January 10, 1986
8	Jan 13 1986		REDISTRIBUTED. January 17, 1986
9	Jan 21 1986		Petition GRANTED. *****
11	Jan 30 1986		Order extending time to file brief of petitioner on the merits until March 31, 1986.
12	Mar 31 1986		Brief amicus curiae of AFL-CIO filed.
13	Mar 31 1986		Brief amicus curiae of Equal Employment Advisory Council filed.
14	Mar 31 1986		Brief of respondent Ansonia Federation of Teachers in support of petitioners filed.
15	Mar 31 1986		Joint appendix filed.
16	Mar 31 1986		Brief of petitioners Ansonai Bd. of Ed., et al. filed.
17	Apr 2 1986		Record filed.
18	Apr 2 1986		Certified copy of original record and C. A. proceedings received. (Box).
20	Apr 8 1986		Order extending time to file brief of respondent on the merits until June 27, 1986.
21	Apr 18 1986	D	Motion of respondent Ansonia Federation of Teachers for divided argument and for additional time for oral argument filed.
22	Apr 28 1986		Motion of respondent Ansonia Federation of Teachers for divided argument and for additional time for oral argument DENIED.
23	May 1 1986	G	Motion of The Rutherford Institute of Alabama, et al. for leave to file a brief as amici curiae filed.
24	May 20 1986	G	Motion of respondents Ansonia Federation of Teachers, et al. for divided argument filed.
25	May 27 1986		Motion of The Rutherford Institute of Alabama, et al. for leave to file a brief as amici curiae GRANTED.
26	Jun 2 1986		Motion of respondents Ansonia Federation of Teachers, et al. for divided argument GRANTED.

Entry	Date	Note	Proceedings and Orders
27	Jun 17 1986	Brief amicus curiae of Connecticut filed.	
28	Jun 27 1986	G Motion of Council on Religious Freedom for leave to file a brief as amicus curiae filed.	
29	Jun 27 1986	Brief of respondent Ronald Philbrook filed.	
30	Jun 27 1986	G Motion of Catholic League for Religious and Civil Rights for leave to file a brief as amicus curiae filed.	
31	Jun 27 1986	G Motion of General Conference of Seventh-Day Adventists for leave to file a brief as amicus curiae filed.	
32	Jun 27 1986	G Motion of American Jewish Congress for leave to file a brief as amicus curiae filed.	
33	Jun 27 1986	Brief amicus curiae of United States and EEOC filed.	
34	Jun 27 1986	Brief amicus curiae of Presbyterian Church (U.S.A.), et al. filed.	
35	Jul 17 1986	CIRCULATED.	
36	Jul 28 1986	SET FOR ARGUMENT. Tuesday, October 14, 1986. (2nd case) (1 hour).	
37	Aug 22 1986	G Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.	
38	Sep 3 1986	Motion of Council on Religious Freedom for leave to file a brief as amicus curiae GRANTED.	
39	Sep 3 1986	Motion of Catholic League for Religious and Civil Rights for leave to file a brief as amicus curiae GRANTED.	
40	Sep 3 1986	Motion of American Jewish Congress for leave to file a brief as amicus curiae GRANTED.	
41	Sep 3 1986	Motion of General Conference of Seventh-Day Adventists for leave to file a brief as amicus curiae GRANTED.	
42	Sep 24 1986	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.	
43	Oct 4 1986	X Reply brief of petitioners Ansonia Bd. of Ed., et al. filed.	
44	Oct 14 1986	ARGUED.	

85-495

Supreme Court, U.S.
FILED
SEP 20 1985

JOSEPH F. SPANIOLO, JR.
CLERK

No. _____

In The
Supreme Court of the United States
October Term, 1985

Ansonia Board of Education and
Nicholas Collicelli, Dr. Charles J. Connors,
Kenneth Eaton, William Evans, Del Matricaria,
Susan Schumacher, Faith Tingley, and
Robert E. Zuraw,

Petitioners,

v.

Ronald Philbrook,

Respondent.

Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

THOMAS N. SULLIVAN
646 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-2141
Counsel of Record for Petitioners

On the Brief:

Robert J. Murphy
Leslie A. Collins

65 PR

QUESTIONS PRESENTED

1. Did the circuit court err in holding that Respondent established a *prima facie* case of religious discrimination under Title VII by refusing to provide Respondent with additional paid leave for religious observance?

2. Does Title VII require an employer to accept an employee's proposal where the employer and employee have each proposed a reasonable accommodation of the employee's religious beliefs?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement of Case	3
Reasons for Granting Writ	4
Appendix A — Opinion, United States Court of Appeals, Second Circuit	1a
Appendix B — Order, United States Court of Appeals, Second Circuit	25a
Appendix C — Memorandum, United States District Court of Connecticut	26a
Appendix D — Order, United States Supreme Court	38a

TABLE OF AUTHORITIES

Cases

	Pages
<i>American Postal Workers v. Postmaster General</i> , 84-3288 (9th Cir. argued Aug. 15, 1985)	10
<i>Brener v. Diagnostic Center Hospital</i> , 671 F.2d 141 (5th Cir. 1982)	5,9
<i>Chrysler Corp. v. Mann</i> , 561 F.2d 1282 (8th Cir. 1977), cert. denied 434 U.S. 1039 (1977)	9
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	7
<i>EEOC v. Caribe Hilton Hotel</i> , 597 F. Supp. 1007 (D.P.R. 1984)	6,7,9

<i>Estate of Thorton v. Caldor Inc.</i> , ____U.S.____, 105 S.Ct. 2914 (1985)	8,10
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985)	7
<i>Pinsker v. Joint District Number 28J</i> , 735 F.2d 388 (10th Cir. 1984)	5,7,9
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	4,7,8,9,10,11
<i>Turper v. Missouri-Kansas-Texas Railroad Co.</i> , 735 F.2d 1022 (5th Cir. 1984)	5
Legislative Material Cited	
110 Cong. Rec. 13,079-13,080 (1964)	11
118 Cong. Rec. 705-706 (1972)	10

No. 85-_____

-1-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION and
NICHOLAS COLLICELLI, DR. CHARLES J. CONNORS,
KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA,
SUSAN SCHUMACHER, FAITH TINGLEY, and
ROBERT E. ZURAW,

Petitioners,

v.

RONALD PHILBROOK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals entered March 7, 1985, the denial of the petition for rehearing issued June 7, 1985, and the opinion of the district court are set out in the Appendix. The decision of the court of appeals is reported at 757 F.2d 476. The decision of the district court is unreported.

JURISDICTION

The decision of the court of appeals reversing the judgment of the district court was entered March 7, 1985. A petition for rehearing was denied on June 7, 1985. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 25, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1). The jurisdiction of the district court was based on 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5 (f) (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment I of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Title VII of the Civil Rights Act of 1964, As Amended (Excerpts) Section 703(a), 42 U.S.C. §2000e-2(a):

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

Section 701(j), 42 U.S.C. §2000e(j):

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

STATEMENT OF CASE

Respondent, Ronald Philbrook, has been employed by petitioner, Ansonia Board of Education, as a teacher since 1962. In 1968, Philbrook became a member of the Worldwide Church of God, the tenets of which require that members refrain from servile work on designated holy days as a condition of receiving eternal life. As a member of the Worldwide Church of God, Philbrook has been required to refrain from secular employment on up to six holy days occurring during the school year. Since the 1967-68 school year, collective bargaining agreements between the board of education and the Ansonia Federation of Teachers, the union representing members of the Ansonia teachers' bargaining unit, have entitled Philbrook to three days of paid annual leave to observe religious holidays. Philbrook and other teachers in Ansonia are provided eighteen additional days of paid leave cumulative to 180 days for illness and other enumerated purposes including three days of leave to attend to "necessary personal business." These three days of paid leave, under the terms of the governing collective bargaining agreements, may not be used for those reasons for which paid leave is otherwise provided.

In order to accommodate Philbrook's need to refrain from work on more than three days, the board of education has allowed him to be absent without pay beyond the three days of paid leave guaranteed under the collective bargaining agreements. From the 1970-71 school year to the present, Philbrook has consistently availed himself of the religious leave sections of the agreement taking three days of paid leave in each school year. It has been the practice of the school board to deduct a day's pay from Philbrook's salary for each day in excess of the three claimed by Philbrook to have been taken for the observance of holidays.

PROCEEDINGS BELOW

Philbrook filed his complaint with the district court alleging that the school board's refusal to grant him additional days of paid leave for religious observance violated Title VII and the First Amendment. The district court accepted jurisdiction under 28 U.S.C. §1331 and §1334 and under 42 U.S.C. §2000e-5(f) (3). After reviewing this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the district court concluded that, as in *Hardison*, there was no statutory basis for granting Philbrook's request because in essence Philbrook was seeking preferential treatment rather than accommodation (pp.34a-36a *infra*).

Philbrook then appealed the district court's decision. The Second Circuit reversed the judgement of the district court holding that Philbrook established a *prima facie* case of religious discrimination by demonstrating that the school board's policy of limiting paid leave for religious reasons was in conflict with Philbrook's need to observe religious holidays on scheduled work days and that the school board's practice of giving Philbrook unpaid leave was discriminatory (pp.11a-12a *infra*). The court further held that Title VII requires an employer to accept an employee's proposal where the employer and employee each propose a reasonable accommodation (pp.14a-15a *infra*). The panel remanded the case to the district court for a determination of whether accommodating Philbrook's religious practices by granting him additional paid leave, as he proposed, would constitute undue hardship within the meaning of Title VII (p.16a *infra*).

The Board of Education's petition for a re-hearing was denied on June 7, 1985 (p.25a *infra*).

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT OF APPEALS HOLDING THAT THE RESPONDENT ESTABLISHED A *PRIMA FACIE* CASE OF RELIGIOUS DISCRIMINATION CONFLICTS WITH THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS ON A VIRTUALLY IDENTICAL ISSUE.

In order to establish a *prima facie* case of religious discrimination, a plaintiff must prove (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she has informed the employer of this belief; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement. *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984), *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982).

The Tenth Circuit has applied this standard to facts virtually identical to those of the present case. *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984). In *Pinsker*, a tenured teacher who was a member of the Jewish faith argued that the defendant school board's leave policies infringed on the practice of his religion because the policies failed to provide him with paid leave for all religious holidays. The school board's leave policy in *Pinsker* provided teachers with twelve days of paid leave, all of which a teacher might use for sick leave and two days of which a teacher might use for personal business. Pinsker was allowed to take two days of paid leave to observe Jewish holidays and additional days of unpaid leave for any other holiday occurring during the school year. He sought three additional days of paid leave arguing that the school board failed to reasonably accommodate his religious practices.

On appeal from the district court's decision dismissing the Title VII claim, the Tenth Circuit held that Pinsker had not established a *prima facie* case of religious discrimination under Title VII because the school board's "policies and practices jeopardized neither Pinsker's job nor his observance of religious holidays." *Id.* at 391. Thus, Pinsker failed to satisfy the first and third prongs of the test for establishing a *prima facie* case under Title VII: his religious needs did not conflict with the board's practice of providing him with additional unpaid leave for religious observance, and he was not disciplined for his absences. *Id.* at 390.

In arriving at its decision, the Tenth Circuit reasoned that teachers are likely to have different religious beliefs and degrees of devotion and that a school board cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs. *Id.* at 391. The court also noted that Title VII does not require an employer to spare an employee all costs associated with religious practices. *Id.* See also, *EEOC v. Caribe Hilton Hotel*, 597 F. Supp. 1007 (D.P.R. 1984) (stating that Title VII does not require an employer to pay an employee for time not worked). The court thereby implied that a school board's decision to provide unpaid rather than paid leave should not be characterized as discriminatory or disciplinary.

Applied to the facts of this case, the Tenth Circuit's decision in *Pinsker* would require a dismissal of Philbrook's Title VII claim for his failure to establish a *prima facie* case of religious discrimination. No conflict arose between the school board's job attendance requirements and Philbrook's religious needs by virtue of the school board's providing three days of paid leave and a number of days of unpaid leave. In this regard, it is indisputable that a work rule requiring employees to work as a pre-condition to receiving compensation, fairly applied to all employees, would not constitute discrimination within the meaning of Title VII. Thus, an employer who chose not to provide any form of paid leave, but allowed employees days off without pay for secular or religious reasons would not be engaged in employment discrimination; nor would an employer who chose to provide employees one day of paid leave and a number of days of unpaid leave to attend to secular or religious business be engaged in such discrimination. No conflict between the job attendance requirements and the employee's religious practices would arise because the attendance requirements have been waived by the employer. Accordingly, Philbrook was simply denied an extra benefit which was also unavailable to other teachers. Considering the heterogeneity of the labor force, as pointed out in *Pinsker*, and the school board's duty to treat all employees equally, unpaid leave was a compatible practice enabling Philbrook to practice his religious beliefs without detriment to his job or career.

The Second Circuit, in contradiction to the *Pinsker* decision, held that a conflict existed between Philbrook's religious observance and the school board's unpaid leave practices.¹ Moreover, the court held that the school board's action in giving Philbrook unpaid leave was disciplinary and akin to discriminatory firing.

Neither case law nor the legislative history of the statute support the Second Circuit's expansive view that an employer discriminates within the meaning of Title VII if it allows unpaid leave for religious observance but refuses to pay a teacher for not working. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 488 (2d Cir. 1985) (Pollack J. dissenting). See also, *Pinsker v. Joint District No. 28J*, 735 F.2d 338 (10th Cir. 1984); *EEOC v. Caribe Hilton Hotel*, 597 F. Supp. 1007 (D.P.R. 1984). Furthermore, support for the Second Circuit's holding cannot be gleaned from decisions of this Court construing Title VII.

This Court has stated that Title VII was enacted to ensure that similarly situated employees are not treated differently solely because they differ with respect to religion. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977). This Court has further stated that "Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary and unnecessary' employer-created barriers to professional development." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982). As the dissent points out, the leave policy in the present case does not make distinctions between Philbrook and other employees or place a barrier to Philbrook's professional development. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 489 (2d Cir. 1985) (Pollack J. dissenting). Instead, the policy mandates that all teachers are entitled to a limited amount of paid leave to observe religious holidays.

¹The court did not refer to *Pinsker* in its analysis of Philbrook's Title VII claim. The dissent, however, noted the conflict.

Rather than being treated in a discriminatory fashion, Philbrook has received favored treatment by the school board. Under the terms of the collective bargaining agreement, employees who take leave for religious observance are already entitled to three more days of paid leave than other employees. While some disparity in treatment between religious observers and non-religious observers may be justifiable as an attempt to accommodate religious beliefs, this Court has noted that Title VII does not contemplate preferential treatment for minorities and that discrimination is proscribed when it is directed against majorities as well as minorities. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 81 (privileges may not be allocated according to religious beliefs). See also, *Estate of Thorton v. Caldor Inc.*, ___U.S. ___, 105 S.Ct. 2914 (1985) (concurring opinion). The school board's practice of granting Philbrook unpaid leave for religious observance could be viewed as preferential treatment although other employees are not deprived of benefits because of this treatment. In no sense, however, has Philbrook been discriminated against because of his religious beliefs or practices.

In summary, what Philbrook seeks is not an accommodation of his religious practices, but a subsidy of those practices. Philbrook contends that because the school board has allotted to employees what is arguably a generous portion of paid leave, it can afford to be more generous and underwrite all of his absences arising for religious reasons. It is submitted that Title VII does not compel this result any more than it would require an employer who provides no form of paid leave to compensate employees for absences taken to observe religious holidays. However, following the rationale expressed in the Second Circuit's opinion to its logical conclusion, Title VII would require an employer to provide this form of subsidy, and to the extent that the statute has been correctly construed, a serious question as to its constitutionality under the Establishment Clause arises.

In light of *Pinsker*, this Court's action is needed to ensure consistent application of Title VII in accordance with the intent of Congress and to prevent preferential treatment on the basis of religion.

II. THE DECISION OF THE COURT OF APPEALS REQUIRING AN EMPLOYER TO ACCEPT AN EMPLOYEE'S PROPOSAL OF REASONABLE ACCOMMODATION CONFLICTS WITH THE DECISIONS OF OTHER FEDERAL COURTS.

Title VII imposes upon employers a duty to reasonably accommodate employees' religious beliefs. The Fifth Circuit in *Brener v. Diagnostic Center Hospital*², 671 F.2d 141 (5th Cir. 1982), has interpreted this provision to include the requirement that an employee make a good faith effort to satisfy his religious needs through means offered by the employer. Similarly, the Eighth Circuit has recognized that an employee has a duty to attempt to accommodate his beliefs and to cooperate with the employer's attempts at reasonable accommodation. *Chrysler Corp. v. Mann*, 561 F.2d 1285 (8th Cir. 1977) cert. denied 434 U.S. 1039 (1977). In *Pinsker*, the Tenth Circuit noted that Title VII does not require employers to accommodate the religious practices of an employee in exactly the same way the employee would like to be accommodated. 735 F.2d at 390. See also, *EEOC v. Caribe Hilton*, 597 F.Supp. 1007 (D.P.R. 1984).

This Court has on one occasion interpreted Title VII's prohibition against religious discrimination and has concluded that an employer fulfills its duty under Title VII by offering employees a reasonable accommodation of their religious practices. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 at 78. However, there is no suggestion in *Hardison* that an employer must accept an employee's proposal. Moreover, a rule that an employer must implement an employee's accommodation proposal arguably violates the Establishment Clause of the First Amendment. In a recent decision this Court struck down a Connecticut statute which unconditionally required that employers grant an

²The Second Circuit erroneously concluded that the *Brener* Court, by implication, approved the concept that Title VII requires an employer to accept an employee's proposal. The court failed to address the language in that opinion which specifies that an employee has a duty to attempt to accept the employer's proposal.

employee's request for leave to observe the Sabbath.³ *Estate of Thorton v. Caldor, Inc.*, ___U.S.___, 105 S.Ct.2914 (1985). This Court concluded that it is unconstitutional to compel an employer to favor religious interests without considering the employer's reasonable accommodation proposal by guaranteeing that employees may decide on which day of the week to be absent for observance of the Sabbath. *Id.* at 2918. While the majority in *Caldor* did not discuss the impact that its decision would have on Title VII, the concurring Justices noted that the reasonable accommodation provisions of Title VII may remain intact because these provisions do not require *absolute* accommodation of the employee's religious belief.⁴ *Id.* at 2919.

Notwithstanding possible constitutional problems and a lack of support for its decision,⁵ the court of appeals in the present case concluded that an employer is required to accept an employee's proposal where the employer and employee have both made proposals of reasonable accommodation. Apart from being in direct conflict with decisions of other circuits, the Second Circuit's decision is not supported by the language of the statute or by the statute's legislative history.

As this Court has pointed out, Congress amended Title VII to require "reasonable accommodation" of employee religious beliefs without specifying the degree of accommodation required. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977). The legislative history of the amendment is similarly silent about the meaning of "reasonable accommodation." *Id.* Its sponsor, however, suggested that the amendment was designed to provide a means of encouraging employer and employee to achieve understanding and to make adjustments accommodating the needs of both parties. 118 Cong. Rec. 705-706 (Sen. Randolph) (1972).

³This decision was rendered after the Second Circuit's decision in the present case.

⁴The implication is that Title VII may be unconstitutional if it advances religion by requiring preferential treatment based upon religious beliefs.

⁵Though not cited in the Second Circuit's opinion, one district court has similarly held that an employer must accept an employee's proposal. The case is now on appeal to the Ninth Circuit. See, *American Postal Workers v. Postmaster General*, No. 84-2388 (9th Cir. argued Aug. 15, 1985).

A plain reading of the statutory requirement of "reasonable accommodation" also warrants the conclusion that Congress intended that the interest of both parties be taken into account as long as the religious beliefs of the employees can be accommodated. The court of appeals in the present case, however, gives priority to employee proposals despite the fact that the employer has provided a reasonable accommodation which it feels is less onerous. In this connection, the Second Circuit's interpretation will frustrate enforcement of the statute which is designed to foster cooperation and conciliation between employers and employees. See, *Trans World Airlines, Inc. v. Hardison*, 432 U.S. at 72 N.6 (quoting 110 Cong. Rec. 13,079-13,080 (1964) (Sen. Clark)). As a result of the Second Circuit's holding, employees will be encouraged to ignore the interest and reasonable suggestions of their employers and instead insist upon an accommodation they prefer. It is likely that increased litigation will result because employees will be less inclined to accept a proposed accommodation no matter how reasonable the proposal is.

The Second Circuit's decision cannot be reconciled with the views of other courts of appeal and is not supported by decisions of this Court. The court's interpretation is contrary to the plain meaning of the statute, and may result in increased litigation and uncertainty for employers. Therefore, this Court's action is needed to resolve the dispute between the circuits and to provide a correct interpretation of the federal statute.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this petition should be granted and a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

Thomas N. Sullivan
646 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-2141
Counsel of Record
for Petitioners

1a

Appendix A

OPINION, UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 397 — August Term, 1984

(Argued: November 14, 1984 Decided: March 7, 1985)

Docket No. 84-7548

RONALD PHILBROOK,

Appellant,

— v. —

ANSONIA BOARD OF EDUCATION AND NICHOLAS
COLLICELLI, DR. CHARLES J. CONNORS, KENNETH
EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN
SCHUMACHER, FAITH TINGLEY, ROBERT E. ZURAW,
ANSONIAL FEDERATION OF TEACHERS, LOCAL 1012,
AFL-CIO, JOSE NEVES, KATHLEEN ROBERTS, MARY
GHIRARDINI, DENNIS GLEASON, DOMINICK GOLIA,
MAUREEN WILKINSON, AND GEORGETTE WILLIAMS,

Appellees.

Before:

OAKES and KEARSE, *Circuit Judges*, and POLLACK,
*District Judge.**

Appeal from a judgment of the United States District Court
for the District of Connecticut, Thomas F. Murphy, *Judge*,
holding that a school teacher had failed to prove his claim of
religious discrimination under Title VII of the Civil Rights Act
of 1964, 42 U.S.C. §2000e-2, and the First Amendment.

* Of the Southern District of New York, sitting by designation.

Reversed and remanded.

David N. Rosen, New Haven, CT, *for Appellant.*

Thomas N. Sullivan, Hartford, CT (Robert J. Murphy, Hartford, CT, of counsel), *for Appellees Ansonia Board of Education and the Individual School Board Members.*

Robert F. McWeeney, Hartford, CT, *for Appellees Ansonia Federation of Teachers, Local 1012, and Union Officers.*

OAKES, *Circuit Judge:*

Ronald Philbrook, a high school teacher in Ansonia, Connecticut, appeals from a judgment of the United States District Court for the District of Connecticut, Thomas F. Murphy, Judge, after a bench trial, finding that he failed to prove his claim of religious discrimination in employment against the Ansonia Board of Education (the "school board") and the Ansonia Federation of Teachers, Local 1012 (the "union"). Philbrook, a member of the Worldwide Church of God, claims that the school board's leave policies violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1982), and the free exercise clause of the First Amendment. Reaching only the statutory issue, we reverse and remand.

BACKGROUND

Appellant has taught typing and business at Ansonia High School since 1962. Some time later he began studying and observing the teachings of the Worldwide Church of God. In February, 1968, he was baptized into the church, of which he remains a member. The tenets of the church require members to refrain from secular employment on certain designated holy days each year. These holy days are determined with reference to the Hebrew calendar. Thus they often fall on different days in different years. Several of these holy days usually fall during a school week. Appellant estimated that if he is to observe the required holy days he will have to miss approximately six school days each year.

The school board's leave policies, as outlined in collective bargaining agreements with the union, have changed over time:

A. In 1966, the school board and the union, then recognized as the exclusive bargaining representative for Ansonia's teachers, entered into an agreement that provided for five days' leave "for personal and or legal reasons." The agreement also provided for accident and sick leave but said nothing about leave for religious reasons.

B. The 1967-1968 contract provided for annual leave of 18 days, cumulative to a total of 150 days, for "personal illness, illness in the immediate family which requires the presence of the teacher, . . . compulsory court appearance as party or witness." It also provided that teachers could use annual leave for other reasons, such as "weddings," a "death in the immediate family," and "personal reasons," limiting weddings and death in the family to a specified number of days and allowing "personal reasons" leave only "at [the] Sup[erintenden]t's discretion." The agreement also stated that teachers could take up to three days' leave "for observance of Religious Holy Days which church laws make obligatory." Religious leave, however, could not be charged or accumulated as annual leave.

C. The 1968-1969 contract contained many of the same provisions, yet provided for three days per year for "legitimate and necessary personal business at the teacher's discretion," and included the three days for religious observance as annual leave days, which presumably were cumulative.

While none of these early agreements expressly stated that personal business leave could not be used for religious observance, it appears that the school board interpreted these categories as exclusive. Later contracts makes the exclusivity explicit. The 1969-1970 contract again allowed three days for personal business and three days for religious holidays, but the latter were no longer part of annual leave. Moreover, it stated that "[n]o annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of 3 days per year." The 1970-1971 contract added a provision stating that personal business leave

days could not be used for any of a number of enumerated activities, including "[a]ny religious activity."¹

The next modification of the restrictions on personal business leave is evinced by the agreement for 1978 through 1982. The contract still provided for three days, but only one was at the teacher's discretion. The other two would be authorized only after the teacher gave the reason for his or her absence. The current agreement, in effect until 1985, contains the same leave provisions.²

¹ The agreement for 1971-1972 also changed the salary deduction for unauthorized absences. Previously, a teacher would have been docked 1/200 of his or her salary for an unauthorized absence, but after 1971 the deduction was increased to 1/180 of the teacher's annual salary.

² The current contract, which, one would have to say, speaks by the book, provides in pertinent part:

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness and/or illness in the immediate family (spouse, children, parents, and family members residing in household), which requires the presence of the professional staff member, and within the limits stated below:

limit of 2 days per

- | | |
|--|--|
| *1. Death in the immediate family | 5 day limit each time |
| 2. Family funeral attendance | 1 day each time |
| 3. Friend funeral attendance | 1 day each time — limit of 2 days per year |
| *4. Immediate family wedding | 1 day each time |
| *5. Immediate family graduation | 1 day each time |
| *6. Immediate family religious ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism) | 1 day each time |
| 7. Official delegate to national veterans organization | 1 day per year |
| 8. Official delegate (President and/or Business Agent) to national or state teachers organization | 1 day per year — without charge |

[Footnote continued on following page]

[Footnote continued from previous page]

- | | |
|---|----------------------------------|
| 9. Official delegate (other than President and/or Business Agent) — (limit of 3) to national or state teachers organization | 1 day per year |
| 10. Mandated religious observance | 3 days per year — without charge |

Those holidays which are required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to religious holidays in excess of three days per year.

- | | |
|---------------------------------|-----------------------|
| 11. Necessary personal business | 3 days total per year |
| a. Necessary personal business | 1 day per year |
- Granted at the discretion of the professional staff member with 48 hour notification to the immediate supervisor. Professional staff member will note personal day on the form provided by Board of Education.

- | | |
|--|-----------------|
| b. Necessary personal business with approval | 2 days per year |
|--|-----------------|

Professional staff member must request the days for personal business on a form provided by the Board of Education forty-eight (48) hours prior to such leave. Reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business. The professional staff member shall make all reasonable efforts to plan and conduct personal business so that it does not conflict with assigned professional duties. Exceptions regarding the forty-eight (48) hour notice provision and/or use of prepared form may be made in cases of emergencies.

Necessary personal business shall not include (without limitations):

1. Marriage attendance or participation;
2. Day following marriage or wedding trip;
3. Attendance or participation in a sporting or recreational event;
4. Any religious observance;
5. Travel associated with any provision of annual leave;
6. Purposes set forth under annual leave or another leave provision of this contract.

*NOTE: Immediate family shall be defined as spouse, children, parents, step-parents, grandparents, brothers, sisters, parents-in-law, family members residing in the professional staff member's household.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

[Footnote continued on following page]

[Footnote continued from previous page]

Absence due to jury duty shall be considered as authorized leave and shall not be charged to annual leave. Immediately upon notice of the possibility of the teacher serving jury duty, such notice shall be communicated to the teacher's principal. All teachers shall make every effort to be excused from jury duty.

The Board may require satisfactory proof of illness after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to 1/180th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

From 1967 through 1976, appellant took unauthorized absences for religious holidays in excess of three days per year, for which the school board docked appellant's salary. Although some of the contracts during this period appear to leave the reason for personal business absences to the teacher's discretion, appellant claims to have taken no personal business leave on church holy days. In 1976, however, appellant stopped taking unauthorized leaves for religious reasons, claiming that his family could not sustain the financial strain of the docked salary. He began to schedule required hospital visits on church holy days, and on several occasions he worked on a holy day.

Appellant claims to have sought relief from both school authorities and the union. The school board has always allowed appellant to take unpaid leave for religious holy days, but appellant has repeatedly suggested two other arrangements. On the one hand, appellant has asked that the school board allow personal business leave be used for religious observance. On the other hand, appellant has offered to pay the full cost of a substitute instead of being docked the larger pro rata salary deduction for observing religious holy days in excess of the three allotted by contract.³ Moreover, he has agreed to supervise the substitute and to make up for days missed by doing meaningful school

³ In 1984, it cost \$30 per day to hire a substitute, while the school board would have docked appellant over \$130 for one unauthorized absence.

work at other times. The school board has consistently rejected both proposals.

Appellant's legal battle seeking accommodation of his religious practices began in 1973 when he filed a complaint against the school board and the union with the Connecticut Commission on Human Rights and Opportunities ("CHRO") and the Equal Employment Opportunity Commission ("EEOC"). The CHRO found probable cause to believe that the school board's refusal to allow personal business leave to be used for religious observance constituted religious discrimination, and attempted conciliation. The CHRO's conciliation agreement proposed that the school board and the union agree to "amend [the leave provisions] . . . so not to deny employees the use of their accumulated personal business days for observance of Religious Holidays." The agreement also provided appellant with back pay compensation. The school board rejected the proposed conciliation.⁴

Soon thereafter the EEOC assumed jurisdiction and also found probable cause. The EEOC attempted conciliation between appellant and the union, but these efforts failed.⁵ On September 19, 1977, the EEOC issued a right-to-sue letter.

Appellant filed his complaint in federal court on December 16, 1977, alleging that the school board's prohibition from using personal business leave for religious observance violated Title VII and the First Amendment. In addition to charging the school board and the union, appellant added the individual members of the school board and various present and former union officers as defendants. All parties moved for summary judgment, but on April 8, 1983, the district court denied the motions, finding that material facts were in dispute.

⁴ After the Connecticut Supreme Court decided *Corey v. Avco-Lycoming Division*, 163 Conn. 309, 307 A.2d 155 (1972), cert. denied, 409 U.S. 1116 (1973), limiting an employer's duty to accommodate employees' religious beliefs under the Connecticut Fair Employment Practice Act, the CHRO ended its conciliation efforts.

⁵ In 1975, the union instituted a grievance proceeding against the school board on behalf of appellant. The only issue before the arbitrator, however, was the meaning of the Ansonia collective bargaining agreement. The arbitrator denied the grievance.

After a two-day trial, the district court held that appellant had failed to prove religious discrimination. The court's opinion first outlines the facts that were not in dispute. After reviewing appellant's testimony concerning his religious practices, the court declined to find appellant insincere in his religious beliefs, though it had "some doubts of his sincerity." The court made no finding, stating that "we draw no inference of insincerity without more facts. Neither do we find he was sincere." After reviewing what it deemed relevant Supreme Court case law, the court concluded that appellant failed to prove religious discrimination, because he had "not been placed by the School Board or any of its members or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job." In addition, the court stated that it had no jurisdiction over the individual school board members or union officers under Title VII or 42 U.S.C. § 1983.

DISCUSSION

Appellant's Prima Facie Case

In this case of first impression, we begin by examining Title VII's prohibition against religious discrimination. Under Title VII, an employer cannot discriminate against any employee on the basis of the employee's religious beliefs unless the employer shows that he cannot "reasonably accommodate" the employee's religious needs without "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j).⁶ The parties assume

⁶ 42 U.S.C. § 2000e(j) provides:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e-2(a) (1) provides, in pertinent part:

(a) It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin

The legislative history provides little assistance in interpreting § 2000e(j). See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 & n.9 (1977).

and we agree that Title VII requires the plaintiff to make out a prima facie case of discrimination, after which the burden shifts onto the employer to show that it cannot reasonably accommodate the plaintiff without undue hardship on the conduct of the employer's business. See, e.g., *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979). While the district court omitted to apply this burden of proof sequence or to make the findings required under it, necessitating remand, we state the guidelines for the case on remand.

We first adopt the approach to plaintiff's prima facie case taken by several courts of appeal:

A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

Turpen, 736 F.2d at 1026; accord *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979); *Anderson*, 589 F.2d at 401; *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978). Moreover, we agree that a finding of probable cause by an administrative agency, such as the EEOC, though not determinative, is admissible to help establish this prima facie case. See, e.g., *Smith v. Universal Services, Inc.*, 454 F.2d 154, 157-58 (5th Cir. 1972). On the record before us plaintiff has almost certainly satisfied this prima facie standard.

We reject the school board's invitation to hold that appellant has failed to establish the sincerity of his religious beliefs. The district court expressly declined to make any such finding. In fact, on the record below, we would be inclined to reverse a finding of insincerity as clearly erroneous.

We acknowledge that it is entirely appropriate, indeed necessary, for a court to engage in analysis of the sincerity — as opposed, of course, to the verity — of someone's religious beliefs in both the free exercise context, see, e.g., *United States*

v. Ballard, 322 U.S. 78, 86 (1944); *Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984); L. Tribe, *American Constitutional Law* § 14-11, at 859-61 (1979), and the Title VII context. We see no reason for not regarding the standard for sincerity under Title VII as that used in free exercise cases. See *Redmond*, 574 F.2d at 901 n.12; cf. *Lewis v. Califano*, 616 F.2d 73, 77-81 (3d Cir. 1980) (using free exercise standards for determining whether religious belief is a "justifiable cause" for declining surgery under the Social Security regulations). This court has recently held that a sincerity analysis is necessary in order to "differentiat[e] between those beliefs that are held as a matter of conscience and those that are animated by motives of deception and fraud." *Patrick*, 745 F.2d at 157. In *International Society for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 441 (2d Cir. 1981) (citations omitted), we outlined several factors that indicate insincerity, noting that "an adherent's belief would not be 'sincere' if he acts in a manner inconsistent with that belief . . . or if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine." The *Barber* court also stated that "the religion's size and history" is relevant to the sincerity determination. *Id.* The burden on plaintiff, however, is not a heavy one. We must avoid any test that might turn on "the factfinder's own idea of what a religion should resemble." L. Tribe, *supra*, at 861.

The school board argues that appellant's failure to take unpaid leave on holy days during the past several years shows that appellant has acted in a manner inconsistent with his "beliefs," and therefore that those beliefs were not sincerely held. We cannot agree. From 1968 through 1976 appellant accepted the docking of his pay to take off the holy days for which religious leave was not provided. After 1976 he worked on certain holy days because he could no longer afford the docking of his salary. We find it distinctly unpalatable for the school board to argue that a lack of sincerity was evidenced because after many years of paying for his extra holy days the appellant stopped paying and obeyed the school board's rules that forbade him from engaging in religious activity on extra days away from school. The school board's leave policy forced appellant to act in a way inconsistent with his religious belief. Appellant's claim that he was reacting

to financial pressure rebuts the inference of fraud from his actions. Cf. Note, *Religious Exemptions Under the Free Exercise Clause: A Model of Competing Authorities*, 90 Yale L.J. 350, 371 (1980) (arguing that for purposes of disallowing religious tax exemptions there should be "affirmative proof of fraud"); see also *Ballard*, 322 U.S. at 92-98 (Jackson, J., dissenting).

In addition, we note that, while the district court had "some doubts of his sincerity because of his vagueness and claimed poor memory of when and where he attended religious services," it wisely declined to make a finding of insincerity without "a full exposition of facts," *Patrick*, 745 F.2d at 157. Moreover, it correctly noted that even if appellant was not a regular churchgoer, it "would have trouble" in making a finding of insincerity. Appellant's financial compromise and failure to attend services regularly would not, by themselves, mean that he does not believe that he should not work on holy days. Cf. *Thomas v. Review Board*, 450 U.S. 707, 715 (1981) (courts are incompetent to arbitrate intrafaith differences where a church member's insincerity is at issue).

Turning to the remaining requirements of plaintiff's prima facie showing, appellant gave un rebutted testimony that he informed the school board and the union of his need to be absent on religious holy days, although it is not clear when the union became aware of appellant's needs. On remand, such a finding might be necessary to determine the amount of back pay appellant is entitled to receive, assuming that issue is reached. In addition, it seems clear that appellant suffered a detriment from the conflict between his religious practices and the employment requirements. The district court placed much reliance on the fact that appellant was not forced into a choice between his job and his religious beliefs, but we hold that such a choice cannot be distinguished from the choice here between giving up a portion of his salary and his religious beliefs. While we acknowledge that some courts have stated that discharge was required to make a prima facie showing of discrimination, see, e.g., *Brown*, 601 F.2d at 959, Title VII prohibits not only discrimination in hiring and firing but also discrimination "with respect to compensation, terms, conditions or privileges."

Finally, appellees claim that *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), bars appellant from making out a prima facie case of discrimination by simply claiming that appellee's leave policy is "less than all inclusive." In *Gilbert*, the Supreme Court held that an employer's failure to include pregnancy benefits in its health care plan was not, by itself, sex discrimination. The Court at one point stated that "pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike." *Id.* at 139 (emphasis in original). According to appellees, appellant's need for more than three days' leave for religious holy days is an "additional risk" unique to his faith.

Appellee's reliance on *Gilbert* is misplaced. *Gilbert* addresses whether a classification based on pregnancy was discriminatory on its face and whether the employees had shown that the health care plan had a discriminatory effect on the basis of sex in terms of benefits received. The language appellees rely on is simply part of an explanation why the employees had failed to show that the General Electric Plan had a discriminatory effect. Here, however, appellant has offered evidence that the Ansonia leave policy facially discriminates on the basis of religion; the collective bargaining agreements in effect since 1969 have explicitly stated that personal business leave days may not be used for "[a]ny religious activity" and thus have afforded some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year. Yet even if appellant's claims are analyzed as solely alleging discriminatory effect in this respect, appellees' argument proves too much. Any religious belief can be characterized as an "additional risk." Title VII, at least as applied to religious discrimination, expressly assigns employers a duty to accommodate those beliefs. Moreover, the Supreme Court has recently held that Congress's enactment of the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), not only overturned the specific holding in *Gilbert* "but also rejected the test of discrimination employed by the Court in that case." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 103 S. Ct. 2622, 2627 (1983).

"Reasonable Accommodation" and "Undue Hardship"

The crucial issues in this case remaining for determination involve interpreting the meaning of and relationship between the terms "reasonable accommodation" and "undue hardship." The central precedent, of course, is *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), the only case in which the Supreme Court has addressed "reasonable accommodation" and "undue hardship" under Title VII. In *Hardison*, the employee, like appellant Philbrook here, a member of the Worldwide Church of God, sought to be excused from work on Saturdays, the church's sabbath. *Id.* at 67. The employer operated a large maintenance and overhaul base around the clock. The employees' shift preferences were resolved on the basis of a seniority system outlined in a collective bargaining agreement. Hardison's problems arose when he transferred into a new division and lost his seniority. Prior to the transfer, he had used his seniority to observe the sabbath regularly. After the transfer, however, the union would not agree to a change of work assignments — which would allow Hardison to have Saturdays off — in violation of the seniority provisions of the collective bargaining agreement. *Id.* at 68. Hardison also proposed to work four days a week, but the proposal was rejected by TWA. The Court noted that

Hardison's job was essential, and on weekends he was the only available person on his shift to perform it. To leave the position empty would have impaired supply shop functions, which were critical to airline operations; to fill Hardison's position with a supervisor or an employee from another area would simply have undermanned another operation; and to employ someone not regularly assigned to work Saturdays would have required TWA to pay premium wages.

Id. at 68-69.

The Supreme Court held that the failure to accept these proposed accommodations did not violate Title VII. Addressing what the Court considered the "principal issue" in the case, *id.* at 83 n.14, the Court concluded that the duty to accommodate does not take precedence over seniority rights enunciated in a collective bargaining agreement. *Id.* at 83. And, turning to the issue

more pertinent to this case, the Court held that Hardison's four-day work week proposals involved costs to TWA that amounted to "undue hardship." *Id.* at 84. The Court stated that "[t]o require TWA to bear more than a *de minimis* cost in order to give Hardison Saturdays off is an undue hardship." *Id.* Finally, the Court noted that giving Hardison Saturdays off by "incurring extra costs to secure a replacement for Hardison" would constitute a "privilege . . . allocated according to religious beliefs," *id.* at 84-85, which the Court saw as a form of reverse discrimination.

Hardison did not sound a death knell to the employer's duty to accommodate under Title VII. In *Anderson*, 589 F.2d at 402, the Ninth Circuit rejected a union's argument that any hypothetical hardship constitutes "undue hardship," noting that "[u]ndue means something greater than hardship. Undue hardship cannot be proved by assumptions nor by opinions based on hypothetical facts." Similarly, the *Brown* court held that speculative costs to the employer could not discharge its burden of proving undue hardship. 601 F.2d at 961.

The school board argues that we should find that its longstanding accommodation of three days of paid leave and additional days of unpaid leave for religious observance constitutes a reasonable accommodation and thus satisfies its duty to accommodate, citing the Tenth Circuit's decision in *Pinsker v. Joint District No. 28J*, 735 F.2d 388, 391 (10th Cir. 1984). The *Pinsker* court held that a policy allowing two days of paid leave for religious reasons and additional days of unpaid leave satisfied the duty to accommodate. We presume that Ansonia's leave policy is also "reasonable." And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that the school board has satisfied its burden. The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called "reasonable." Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business.

Although the courts interpreting Title VII's duty to accommodate have never expressly articulated this point, their analyses are consistent with this approach. In most cases, the court is called upon to assess only the employee's proposal; the court does not have to assess the propriety of the employer's offering one accommodation but rejecting the employee's proposed accommodation. See *Hardison, supra*; *Turpen, supra*. Nevertheless, the Fifth Circuit in *Turpen* did state, as we have suggested above, that the reasonableness and undue hardship questions were "interlocking." *Id.* at 1026. Previously, in *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982), the Fifth Circuit had interpreted the duty to accommodate in the same way we do today. The *Brener* court analyzed the reasonableness of the employer's proposed accommodation, *id.* at 145-46, but went on to examine the employee's proposed accommodations to determine whether any did not cause the employer undue hardship. The implication is that, even if the employer proposes a reasonable accommodation it has not satisfied its duty to accommodate unless the employee's suggested accommodations would lead to greater than *de minimis* cost. The EEOC's recent guidelines on religious discrimination — while not dispositive of the interpretation of Title VII, see *Gilbert*, 429 U.S. at 140-42 — also support the approach we above suggest. See 29 C.F.R. § 1605.2(c) (2) (1984).⁷

⁷ Section 1605.2(c) (2) provides:

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities [*sic*], such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

As noted, appellant has offered two proposed accommodations — the use of personal business leave for religious observance and the payment of the cost of a substitute in exchange for not being docked salary for religious leave in excess of three days. On remand the district court must determine whether accepting either of appellant's proposed accommodations would cause undue hardship. We note, however, that on the record before us it appears that neither of the accommodations would lead to greater than de minimis costs.

Appellant clearly prefers that the school board allow him to use personal business leave for religious holy days. The critical factual question concerning this proposal is the past and current scope of the personal business leave provisions. As noted earlier, from 1968 through 1977 three personal business days could be taken at the teacher's discretion, and from 1977 to the present, at least one could be taken at the teacher's discretion. This leaves in the air whether any such day may be taken for any reason except those specifically mentioned, such as religious reasons. Thus, the question is open whether they are usable for various secular purposes, including activities not inconsistent with religious observance. The provision does include the words "legitimate and necessary," but left unsaid is whether leaving the reason to the teacher's discretion abrogates this limiting language. Appellant claims that the provision allows attendance at charity meetings, while the school board argues that its scope is much more narrow. One of the appellant's exhibits at trial — entitled "Teacher Absence Report" — indicates that many teachers have taken at least one personal business day a year and some more than one. It also appears that personal business days are taken more frequently than religious holy days. The presence of a contract provision that allows leave for limited secular activities, such as sick leave or leave for court appearances, does not show that additional paid leave for religious observance in lieu of personal business leave would not cause undue hardship. Employers and unions must be free to outline specific types of paid leaves in a contract without the threat of being charged with religious discrimination. But if the personal business leave provision is as broad as appellant claims, it becomes difficult to believe that drop-

ping the religious exception causes undue hardship.⁴

Even if the district court finds that the personal business accommodation would lead to undue hardship — or if the school board and the union were to agree to take the personal business leave provisions out of the contract altogether — the district court must assess the cost of accepting appellant's substitute proposal. Appellant has offered to pay for a substitute and even to work on other days to make up for the time missed. While there is some testimony below concerning the cost of using substitutes, the court never focused on the cost of appellant's proposed accommodation. The Superintendent of Schools testified that it is difficult to find certified substitutes, especially those qualified to teach typing and business; that the quality of learning with a substitute is low; that substitutes often have difficulty keeping discipline; and that when substitutes teach classroom equipment is often damaged. Yet several questions still must be addressed. Because presumably appellant would know about his upcoming religious holy days well in advance, it is possible that he can work out an arrangement that avoids the traditional problems of finding a qualified substitute at the last minute. While we recognize the difficulty of discipline in a high school classroom, it may also be that discipline and teaching difficulties can be avoided in a business course by having appellant closely supervise the substitute.

⁴ On remand, the district court must make findings about the use of personal business leave from 1968 through the present. Appellant does not only seek prospective relief; he also seeks back pay.

In its brief on appeal, the school board seems to assume that the burden is on appellant to show that the personal business accommodation would not cause undue hardship. It is not: once appellant has made out a prima facie case, the school board has the burden of showing that an accommodation would cause undue hardship.

On the record before us, we decline to accept the school board's argument that the substitute accommodation as a matter of law poses greater than de minimis costs. This case thus might well be distinguished from *Hardison*. The *Hardison* Court held that a need for premium pay or a loss of efficiency can cause undue hardship. Under the proposed substitute accommodation, the school board would not be paying premium wages. Appellant is not asking to have his religious activities subsidized, as the school board claims. Appellant has offered to pay the cost of the substitute and to make up for time off: appellant does not ask for payment for time when he is not working.⁹ Moreover, we are not ready to hold that the school board has shown that there will be a greater than de minimis loss in efficiency. The *Hardison* Court held that using a supervisor or an employee from another area amounted to a greater than de minimis cost because it left other operations undermanned. The same problems may not arise under the substitute accommodation. One would suppose that the school system has the ability to find qualified substitutes. If appellant communicates with the substitute before and after the days he must miss, there may well be no appreciable loss in the quality of education, where the number of additional

⁹ The district court also thought appellant wanted something for nothing. Certainly it was overlooking his offer to work extra hours to make up for days missed. The court noted an analogous federal statute providing a government employee with "abstention from work during certain periods of time" for religious reasons if the employee "engage[s] in overtime work for time lost," 5 U.S.C. § 5550a (1982), yet the court incorrectly stated that appellant "agrees with everything but the work part." The statute appears to support, not weaken, appellant's claim.

substitute days appears to be three.¹⁰ *Cf. Turpen*, 736 F.2d at 1028 & n.6 (holding that it was not clearly erroneous for the district court to find that a substitute accommodation caused undue hardship when there was no built-in system for substitution).

¹⁰ 29 C.F.R. § 1605.2(d) (1) (i) advocates the use of "voluntary substitutes" as an example of reasonable accommodation without undue hardship:

(i) Voluntary Substitutes and "Swaps"

Reasonable accommodation without undue hardship is generally possible where a voluntary substitute with substantially similar qualifications is available. One means of substitution is the voluntary swap. In a number of cases, the securing of a substitute has been left entirely up to the individual seeking the accommodation. The Commission believes that the obligation to accommodate requires that employers and labor organizations facilitate the securing of a voluntary substitute with substantially similar qualifications. Some means of doing this which employers and labor organizations should consider are: to publicize policies regarding accommodation and voluntary substitution; to promote an atmosphere in which such substitutions are favorably regarded; to provide a central file, bulletin board or other means for matching voluntary substitutes with positions for which substitutes are needed.

The school board also suggests that accommodating appellant would constitute preferential treatment. We disagree. While we acknowledge the cautionary language of the Supreme Court in *Hardison*, we do not interpret *Hardison* as vitiating the employer's duty to accommodate. Appellant's proposal for the use of personal business leave for religious observance is not one seeking preferential treatment. He is asking the school board and the union to change its leave policy as applied to everyone. Nor would his substitute accommodation allocate a privilege "according to religious beliefs." *Hardison*, 432 U.S. at 85. Appellant has asked to be treated differently; he has not asked for privileged treatment. In exchange for additional days off, he is willing to make up for time off and pay for the substitute. Differential treatment cannot be equated with privileged treatment. Accepting the school board's argument would "preclude all forms of accommodation and defeat the very purpose behind § 2000e(j)." *Brown*, 601 F.2d at 962.¹¹

¹¹ Perhaps *Hardison* may be read as equating "undue hardship" with preferential treatment. That is to say, accepting an accommodation that would lead to greater than de minimis costs to the employer constitutes under *Hardison* preferential treatment when looked at from the perspective of the employees. Yet accepting a proposal that would not cause undue hardship, does not constitute preferential treatment. We need not reach this question, however.

Moreover, in light of our remand, we do not address the hypothetical question whether accepting either of appellant's proposed accommodations constitutes an unconstitutional establishment of religion. We do note, however, that several courts of appeals have held that Title VII's duty to accommodate does not run afoul of the First Amendment. See *McDaniel v. Essex International, Inc.*, 696 F.2d 34, 37 (6th Cir. 1982); *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239, 1244-46 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); *Notelson v. Smith Steel Workers*, 643 F.2d 445, 453-55 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 43-44 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977).

Union Liability

Finally, we reject the union's argument that we find it not liable for any religious discrimination on the record before us. Title VII places a duty on unions not "to cause or attempt to cause an employer to discriminate against an individual." 42 U.S.C. § 2000e-2(c) (3). We have stated previously that a union's liability depends on its "responsibility for the discrimination." *EEOC v. Enterprise Association Steamfitters Local No. 638*, 542 F.2d 579, 586 (2d Cir. 1976), cert. denied, 430 U.S. 911 (1977). This conclusion is consistent with that of other courts. See, e.g., *Hardison v. Trans World Airlines, Inc.*, 527 F.2d 33, 42-43 (8th Cir. 1975), rev'd on other grounds, 432 U.S. 63 (1977). In *Hardison*, the Eighth Circuit wrote that "the union may be held liable if it purposefully acts or refuses to act in a manner which prevents or obstructs a reasonable accommodation by the employer so as to cause the employer to discriminate." *Id.* at 42. In this case, various union officers testified that they had proposed changes in the collective bargaining agreement's leave policies, but all were rejected. Appellant claims that the union never really pushed for these changes. The union did join appellant in seeking arbitration on appellant's leave policy grievance, but, at the same time, it appears that the union declined to enter into an EEOC conciliation agreement with appellant. Clearly, any further discussion of the issue must await a more detailed development of the facts.¹²

Judgment reversed and remanded for proceedings not inconsistent with the foregoing.

¹² The district court held it had no "jurisdiction" over the individual school board members and the union officers. Appellant does not raise this issue on appeal and, therefore, we do not address it.

While we reach only the Title VII issues, the First Amendment issues remain open, if appellant should lose on the Title VII issues on remand.

POLLACK, *Senior District Judge* (dissenting):

I dissent and vote to affirm on the unassailable facts found below, substantially for the reasons and authorities contained in District Judge Thomas F. Murphy's persuasive opinion.

The issue in this case is whether the School Board should be forced to pay a teacher for not working. There is no indication that the School Board, the Union, or the collective bargaining agreement intended to discriminate against anyone, including plaintiff, on the basis of religion. The School Board and Union, and the membership of the latter, adopted a facially neutral policy giving each employee three days of paid religious leave and three days of paid secular personal leave, which were not to be interchangeable. If an employee wished to take additional religious leave, he was privileged to do so at his own cost without suffering any impact on his employment status.

The majority views the School Board's policy as one that facially discriminates on the basis of religion because it "affords some teachers all the leave they need for religious reasons but does not extend that benefit to members of religious groups that have more than three holy days per year." However, neither case law nor the legislative history of the statute support the majority's expansive position that an employer "discriminates" within the meaning of Title VII if he refuses to give an employee more than three paid religious days when the employee desires more paid leave.

The legislative history makes it clear that Title VII was not concerned with the "no work-no pay" situation. Rather, as the Senate Floor managers explained, the statute was concerned with discriminatory practices, i.e., the situation where an employer

"refuse[d] to hire or to discharge any individual or otherwise to discriminate against him with respect to compensation or terms or conditions of employment because of such individual's race, color, religion, sex, or national origin in such a way as to deprive them of employment opportunities or otherwise affect adversely their employment status."

110 Cong. Rec. 7212 (1964) (April 8, 1964) (Interpretative Memorandum of Title VII submitted by Senators Case and Clark) (emphasis added).

Moreover, the nature of the discrimination that lies at the base of Title VII matters was starkly explained in language that admits of no confusion. The Senate sponsors stated that:

"To discriminate is to make distinctions or differences in the treatment of employees . . ."

Id. at 7218.

Supreme Court opinions also emphasize that Congress enacted Title VII in order to "remov[e] artificial, arbitrary, and unnecessary barriers to employment . . ." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). As the Court reiterated in *Connecticut v. Teal*, 457 U.S. 440 (1982), "Title VII strives to achieve equality of opportunity by rooting out 'artificial, arbitrary and unnecessary' employer-created barriers to professional development." *Id.* at 451 (emphasis added).

The leave policy at issue here does not make distinctions between employees or deny plaintiff the opportunity to pursue his employment and yet have time off to observe his religious holy days. This is not a case where plaintiff is denied employment because his religious beliefs preclude him from working on certain days. See, e.g., *Reid v. Memphis Publishing Co.*, 468 F.2d 346 (6th Cir. 1972). Nor is plaintiff subject to discharge because his religion forbids him to work on these days. See, e.g., *Brown v. General Motors Corp.*, 601 F.2d 956 (1979). Likewise, the policy has no adverse impact on plaintiff's opportunities for advancement; plaintiff has not been denied a promotion because of his religious beliefs. See, e.g., *Haring v. Blumenthal*, 471 F. Supp. 1172 (S.D.N.Y. 1979).

The School Board's policy neither deprives the plaintiff of employment opportunities nor adversely affects his employment status. As Judge Murphy succinctly stated, "[P]laintiff could go without let or hindrance whenever and wherever he wished" (Op. at 13) — but at his own expense. Since the policy does not "discriminate" within Title VII's use and meaning of that term, the statute may not be invoked against the School Board.

It is also clear that the Board has agreeably and reasonably accommodated the plaintiff. Recently, in *Pinsker v. Joint District*

No. 28J, 735 F.2d 388 (10th Cir. 1984), the Tenth Circuit held that a school board made a reasonable accommodation by permitting a teacher to take unpaid leave for religious observance. In *Pinsker*, teachers had a pool of 12 days of paid leave, of which two could be used for "special leave" purposes including religious observance. Plaintiff argued that Title VII required the Board to adopt a leave policy that was less burdensome to religious practices. The court disagreed, stating that the statute does not require employees to "accommodate the employee's practices in such a way that spares the employee any cost whatsoever." *Id.* at 390-91.

In *Pinsker*, the court also held that

"[d]efendant's policy and practices jeopardized neither [plaintiff's] job nor his observation of religious holidays. Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, a school district cannot be expected to negotiate leave policies broad enough to suit every employee's religious needs perfectly."

Id. at 391.

The neutral leave policy challenged here is embodied in a valid collective bargaining agreement. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . ." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79 (1977). Where, as here, the agreement neither impairs employment status nor imposes any artificial, arbitrary, and unnecessary barriers to employment, then, as the Supreme Court stated in *Hardison*, "we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid [collective bargaining agreement]." *Id.* Paid leave from employment is neither contractually nor Constitutionally mandated.

Since the School Board's leave policy does not discriminate on the basis of religion, plaintiff failed — as early as the close of his case — to make out a prima facie case. Consequently, the judgment of dismissal should be affirmed.

Appendix B

ORDER, UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of June one thousand nine hundred and eighty five.

RONALD PHILBROOK,

Appellant,

v.

84-7548

ANSONIA BOARD OF EDUCATION AND NICHOLAS
COLLICELLI, DR. CHARLES J. CONNORS, KENNETH
EATON, WILLIAM EVANS, DEL MATRICARIA, SUSAN
SCHUMACHER, FAITH TINGLEY, ROBERT E. ZURAW,
ANSONIA FEDERATION OF TEACHERS, LOCAL 1012,
AFL-CIO, JOSE NEVES, KATHLEEN ROBERTS, MARY
GHIRARDINI, DENNIS GLEASON, DOMINICK GOLIA,
MAUREEN WILKINSON, AND GEORGETTE WILLIAMS,

Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellees, Ansonia Board of Education, et al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that the said petition for rehearing is DENIED.

It is further noted that a poll of the judges in regular active service having been taken on the suggestion for rehearing in banc and there being no majority in favor thereof, rehearing in banc is DENIED.

Elaine B. Goldsmith
Clerk

Appendix C

MEMORANDUM, UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

RONALD PHILBROOK

Plaintiff

vs.

CIVIL ACTION

N 77-489

ANSONIA BOARD OF EDUCATION, and
NICHOLAS COLLICELLI, DR. CHARLES
J. CONNORS, KENNETH EATON,
WILLIAM EVANS, DEL MATRICARIA,
and SUSAN SCHUMACHER (as President),
and FAITH TINGLEY (as Secretary), in-
dividually and as members of said Board,
ROBERT E. ZURAW, individually and as
Superintendent of the Ansonia School
System, and ANSONIA FEDERATION OF
TEACHERS, LOCAL 1012, AFL-CIO, and
JOSE NEVES, KATHLEEN ROBERTS,
MARY GHIRARDINI, DENNIS
GLEASON, DOMINICK BROGOLIA,
MAUREEN WILKINSON, and
GEORGETTE WILLIAMS, individually and
as officers of said Local

MEMORANDUM

Defendants

MURPHY, D.J.

Ronald Philbrook, a school teacher, sues his employer Ansonia Board of Education and its individual members and also his Union, Ansonia Federation of Teachers, Local 1012 AFL-CIO, and its individual officers for violation of his First Amendment right of the free exercise of religion pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.*, and 42 U.S.C. §1983. Our jurisdiction is derived from 28 U.S.C. §1331 and §1343 and 42 U.S.C. §2000e-5 (f) (3).

Whether we have jurisdiction of the individual members of the

School District under "1983" and the officers of the Union without allegations of diversity of citizenship will be discussed later as will the question of the immunity of such individuals under *Harlow vs. Fitzgerald*, 457 U.S. 800 (1982).

Most of the facts were not in dispute in this two day trial including the necessary jurisdictional prerequisites of filing with the EEOC and its right to sue letter.¹

Plaintiff's complaint alleges that defendants have caused him to lose pay for the days he is required to be absent from work for religious observances although no pay is deducted for non religious personal business. This practice he claims violates his rights under the First Amendment and Title VII of the Civil Rights Act of 1964.

Plaintiff's brief after trial poses the issue as follows: "Plaintiff's contention is that the refusal of annual leave for religious observances, when it is permitted for a wide variety of secular purposes, violates his rights under both the First Amendment and Title VII of the Civil Rights Act of 1964." Defendant School Board's brief phrases the issue as follows: This case presents the questions whether the defendant Ansonia Board of Education . . . is obliged under the free exercise clause of the First Amendment and Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 to grant the plaintiff, a public high school teacher, leave with pay to observe religious holy days occurring during the school year."

The union suggests the central question is: "Does a collective labor contract providing that persons are required to work only 182 days per year violate the First Amendment and Title VII of the Civil Rights Act of 1964, where it grants a total of 18 days paid annual leave for various purposes including three days for religious holy days observance and permits additional religious holydays to be taken without pay."

The facts are not in dispute. Plaintiff has been a teacher of business and typing at Ansonia High School since 1962. In 1968 he became a member of the Worldwide Church of God by baptism. As such he must abstain from servile work on certain designated holy days of his church. He identified the holy days

1. Although the right to sue letter refers only to the charge against Ansonia School system its reference numbers are to both the school and the Union.

as The Passover, Days of Unleavened Bread, Days of Pentecost, Feast of Trumpets, Day of Atonement and Feast of Tabernacles. Such days are usually in September and October. The dates of these days, he said, vary from year to year and average about six per year.

1967, not 1968 as plaintiff testified, was the year when the Union (AFT), the bargaining representative of the teachers at Ansonia High School, negotiated the first of a series of contracts between the Ansonia Board of Education and the teachers. (Exhibit 3) There are separate contracts for the succeeding years.

A summary of plaintiff's employment by the school board, the Union's participation as the teachers' representative in labor matters, plaintiff's church affiliation and attendances at religious services, and the various collective bargaining agreements will serve to place the issue in focus.

Plaintiff became a teacher of typing and business at Ansonia High School in 1962. In 1968 he was baptized into the Worldwide Church of God which requires members to refrain from secular work on holy days. These holy days we are told are found in the Old and New Testament of the Bible and do not necessarily fall on the same day each year and are fixed each year by the Church using the Hebrew calendar wherein the new moon is the first day of the month. One of the exhibits in evidence explains this in some detail but not for all of the years involved. There were no specific dates identified by oral testimony and no specific biblical reference given for verification.

Two pamphlets in evidence, *God's Sacred Calendar, 1971-1972* (Exhibit 12) and *Pagan Holidays or God's Holydays "Which"* (Exhibit 13) give some explanation and biblical history but not sufficient to fix with any certainty the days included in the lawsuit nor did plaintiff attempt to identify such holy days for any relevant period although Exhibit 14 contains the days in the years from October 27, 1967 to October 12, 1979.

Prior to the collective bargaining agreement there was a rather loose system of teachers' authorized paid absences for a variety of purposes and some permissible accumulation of unused leave which is not relevant to the issues in this case. In the year 1968, however, the Ansonia Federation of Teachers (Union) was recognized as the exclusive bargaining representative of the teachers and it negotiated the contract which included in

ARTICLE V specific paid leave days applicable to many contingencies. (Exhibit 3) This contract for the school year 1968-1969 has 18 leave days. From a non limit for compulsory attendance in Court, five days for death in the family, three for church religious obligations and three for personal business. All leaves in excess of the allowed leaves subject to \$25 a day deduction from pay. We find it appropriate to reproduce ARTICLE V of the 1968-1969 contract and the paragraph in succeeding contracts with reference to Religious Holy days.

1968-1969 Contract

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 150 days shall be granted for personal illness, illness in the immediate family which requires the presence of the teacher, and/or for the reasons, and within the limits stated below:

1. Compulsory court appearance as party or witnessno limit
2. Death in the immediate family5 day limit
3. Funerals
 - a) family1 day
 - b) friend.....1 day per year
4. Attendance of a wedding on a school day .1 day
5. Graduation, ordination, etc.1 day
6. Official delegate to National Veterans Organization3 days per year
7. Religious Holy Days which church laws make obligatory3 days per year
8. Legitimate and necessary personal business at the teacher's discretion (but not including marriage or travel for personal or family convenience).....
3 days per year

For absences for personal illness in excess of accumulated leave, a salary deduction of twenty-five (25) dollars shall be made for each day. Proof of illness may be required by the Board at its discretion.

For absences other than for personal illness and not authorized herein, a salary deduction equal to 1/200th of the annual salary shall be made.

In all instances, reasons for absence shall be reported on appropriate forms. Except in emergencies, applications for leave shall be made at least three (3) days in advance.

B. Sabbatical Leave

For the purpose of encouraging professional growth and improvement of the local school program through such growth, the Board shall determine annually the number of teachers who may be absent on sabbatical leave, subject to the following conditions:

All succeeding yearly contracts up to and including June 30, 1985 contain the following paragraph with reference to Religious Holy Days.

"Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." (Emphasis added)

Plaintiff's complaint filed December 16, 1977 has several different allegations describing his claim.

Under a heading entitled Introduction and Jurisdiction he states "The defendants have caused plaintiff to lose pay for days he is required to be absent from work for religious observances, although no pay is deducted for absences for non religious personal business." Also that "he has for ten years been a baptized member of the Worldwide Church of God . . . that as part of the practice of his religion, plaintiff is required to observe certain annual Holy Days . . . approximately five to ten of these days each will fall on days when school is in session. The plaintiff cannot work on these days and must attend church."

When plaintiff joined the Worldwide Church of God (February 1968) he testified that he was able to use his annual personal leave time for observance of his church holy days. Plaintiff was in error on this score. His error was that he did not become a member of the Worldwide Church of God until February 1968, according to his own testimony, and at that time the Union contract for 1967-1968 provided for only three days religious leave and additional days could not be charged against annual leave. However, by the first Board and Union contract plaintiff has not been permitted to use his personal leave time for religious observances since he became a member of the Worldwide Church of God but is permitted "three days each year for religious observances" and "18 days are permitted for personal and sick leave" and "three days as official delegate to a national veterans' organization" but not to be spent for "religious observances" and an additional three may be spent for "legitimate and necessary personal business at teacher's discretion — [but] "shall not include any religious activity."

The next union negotiated contract for 1969-1970 (Exhibit 4) ARTICLE V, Leave Provisions reads: "absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." Because of the last sentence, plaintiff argues it accommodates Jewish teachers in three holy days but no others who were willing to charge the extra days to personal business or other annual leave category.

In the contract, 1970-1971 (Exhibit 5) plaintiff stresses that a change in ARTICLE V, Leave Provisions relating to personal business namely what we capitalize, "6. Legitimate and necessary personal business at the teacher's discretion, *subject to other* provisions of this Article . . . 3 days per year. Personal business shall not include (without limitation) 1. Any marriage attendance or participation. 2. Attendance at any sport or recreational event. 3. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal

business. 4. Purposes set forth in 1 through 5 above. 5. ANY RELIGIOUS ACTIVITY."

After 1970-1971 school year to date, the leave provisions have remained the same. The collective bargaining agreements afford all teachers a total of eighteen days of paid leave for illness and other purposes cumulative annually. It should be noted that Boards of Education are required by statute to grant teachers fifteen days of paid leave for absences due to illness cumulative to one hundred and fifty days. Conn. Gen. Stat. §10-156.

Plaintiff admitted that he has not been docked pay since the school year 1976-1977 for any religious observances and that was because his family started to "drool" as he said and he began to compromise. "I would set up an appointment when I should have been in a church observance either in the Veterans Administration Hospital or for other medical reasons or just regular general sickness that may have occurred and schedule them for a religious holy day." He also testified that on some occasions he actually went to work on a religious holy day. He did not know how many and "guessed" approximately 6 or so that may have fallen on school days, and that he has never taken any personal business days for religious observance that he can recall because he was trying to be completely honest with the contract. He could not remember whether he ever took any personal business days for any reason but he was sure he did some time ago. Nor could he remember if he did within the last six to seven years. He admitted that the annual leave is fixed as to the number of days but it can be accumulated and he admitted that as of the time of trial he had accumulated 80 days.

On cross examination he was vague as to where he observed holy days. We quote one answer: "At times in the location of the church where it would meet or at home or if I was to be at the hospital or wherever, I would observe it there." He was specifically asked where in the year 1983 he observed and answered "In Wallingford. We used the school — a couple of them in Meriden, the Junior Middle School." In answer to the question, were there other places, he replied, "There were other places when I was sick. In some cases I went into work." When asked if there was a person in charge at the school in Meriden, he thought it might have been a minister named Mr. Wooldridge but when he was reminded we were talking about 1983 he said

no he walked out and went to work, and then admitted that he did not attend the services in 1983 at the junior high school. He agreed that in the school years of 1976, 1977, 1978 and 1979 he attended only three services each year. He testified that in connection with the Veterans Administration Hospital he was being treated as an outpatient and would make appointments to meet the clinician. Although this would not be attending church services he did not have to do servile work (thus he would not fulfill his church obligation but he would charge it under the collective bargaining agreement. He was not asked if this was fair.

He admitted that between 1974 and 1983 on the occasions when he took more days for religious observance than were permitted by the contract, he was not threatened with any reprisals or dismissals and was unable to tell how much money he lost in pay for the school year 1976 without looking at the documents nor could he remember the number of days that he took as holy days for which he was not paid during the years of 1976, 1975 or 1974, but he allowed that his claim no matter what it was in money, placed an undue burden on him in the practice of his religion.

He also agreed that the statement contained in defendants' Exhibit B, a letter signed by James R. Rosenthal, an official of his church, addressed to him, which states that one of the sanctions against a member of the Worldwide Church of God for not observing religious days, is the loss of eternal life.

A time consuming analysis of exhibits, introduced with no further explanation, of plaintiff's absences from school for years from 1971-1983 reveals an astounding record of 257 absences. It includes 178 days under the category "illness," 8 days for "personal business," 39 days for "religious observances" and 8 being charged under ARTICLE V A 1-5, and only 18 days' pay being deducted amounting to \$1,231.84.

But most amazing to us and not a word during trial, is the 178 days absence for "illness" and more particularly the coincidence of number of days each succeeding year — 15, 11, 11, 12, 18, 18, 17, 18, 25, 18, 10, 5 — almost 15 days per year.

The School Board argues that the free exercise of religion is tested in part by "sincerity," and that plaintiff's own testimony showed he was not sincere in his espoused religion. We did not have such impression because we found it very difficult to measure. We have some doubts of his sincerity because of his

vagueness and claimed poor memory of when and where he attended religious services and the absence of witnesses, including his wife. We mean people who saw him and possibly discussed religious matters with him. But we must confess that even with such evidence we would have trouble in making a finding of insincerity. It is such a purely mental experience and mere presence at church or some place of observance cannot be the cue.

We do note, however, that plaintiff resides in Ansonia and the religious services or assemblies he testified he attended were in Wallingford and Meriden schools — each approximately 3/4 of an hour away. But we draw no inference of insincerity without more facts. Neither do we find he was sincere.

In *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) the Supreme Court was confronted with the then accommodation "guideline of the Equal Employment Opportunity Commission (EEOC), 29 CFR § 1605.1(b) (1968)" required, as the Act itself now does by 42 U.S.C. §2000e(j) (1970 ed. Supp. V).

In *Hardison* the issue also concerned a member of the Worldwide Church of God who by his own choice had changed his working status when he changed his shift. Being on another job in another building he became subject to a different seniority list and was asked to work on Saturdays when another employee went on vacation. TWA asked the Union to seek a change of work assignments for him but the Union was unwilling to violate the seniority provisions of the collective bargaining contract and suggested that Hardison work only 4 days a week. The company rejected the suggestion because he was the only available person on the shift to perform his job and it would not leave the position empty which was critical to airline operations and to employ someone not regularly assigned to work on Saturday would have required it to pay premium wages. When an accommodation was not reached, Hardison refused to report for work on Saturday. After a hearing he was discharged for insubordination. The District Court ruled in a suit brought under Title VII that the Union's duty to accommodate Hardison's Relief did not require it to ignore its seniority system as Hardison appeared to claim. The lower court held that "TWA had satisfied its 'reasonable accommodations' obligation, and any further accommodation would have worked an undue hardship on the company." The Supreme Court agreed with the District Court.

In writing for the Court Mr. Justice White held:

"We agree that neither a collective-bargaining contract nor a seniority system may be employed to violate the statute, but we do not believe that the duty to accommodate requires TWA to take steps inconsistent with the otherwise valid agreement. Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy, and seniority provisions are universally included in these contracts. Without a clear and express indication from Congress, we cannot agree with Hardison and the EEOC that an agreed-upon seniority system must give way when necessary to accommodate religious observances. The issue is important and warrants some discussion." *id.* at 79 (footnote omitted)

and concluded:

"As we have seen, the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment. In the absence of clear statutory language or legislative history to the contrary, we will not readily construe the statute to require an employer to discriminate against some employees in order to enable others to observe their Sabbath." *id.* at 85

The free exercise of religion is not subject to arbitrary external power. Plaintiff was not subject to any power to attend or not attend any holy day service. He could go without let or hindrance whenever and wherever he wished. He might lose some pay or even his job. The plaintiff did not want it that free. He wanted it to be free as far as his desire or obligation permitted plus pay. This is why he said he did not exercise his "unfettered right to worship, it would cost him money — not that he was prevented." He testified he used to go even after he used his three days but he got tired of having to lose pay for not working.

§2000e-2(j) specifically prohibits an employer granting preferential treatment to any individual because of race, color, religion, etc. But there must be a reasonable accommodation by the

employer, *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977). Congress got the message as it related to Government employees and the next year (1978) it passed and the President approved P.L. 95-390, 5 U.S.C. 5550a, which provides for Government employees' compensatory "time off" for religious observances, wherein an employee who elects to work certain overtime is granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons. In sum, the accommodation is overtime work for equal compensatory time off — plaintiff agrees with everything except the work part. He received time off after 3 paid days without pay.

The Union called all of its present and former officers, most of whom testified that the plaintiff never asked them for any help or advice. But all were willing to help if asked and spoke in favor of increasing the various off free days with pay.

The president, Gleason, was very active in trying to get all different kinds of relief for plaintiff and from the Board of Education — all without success. Including his most recent request for 25 days more of annual leave for all teachers and expansion of the days for religious and secular purposes.

Plaintiff through his Union filed a grievance concerning deductions from his salary for absences over and above the three days for religious observances in the year 1974 totaling \$412.05. A hearing in March 1975 by the American Arbitration Association resulted in favor of the School Board.

The action against the individual members of the School Board is not authorized by the Civil Rights Act of 1964, 24 U.S.C. §§2000e et seq. They are not plaintiff's employers and there is no allegation or proof that there is diversity of citizenship between plaintiff and any of them. This leaves only the possibility of jurisdiction as against them, the claim that they violated "1983." Assuming that such jurisdiction exists on that theory there was not one iota of proof to support the charge that any such individual defendant member of the School Board committed any constitutional tort against plaintiff or indeed against any one else.

As for the individual Union officers named as defendants they too are not employers of plaintiff. They are officers of the Union and are not proper parties in a Civil Rights Act of 1964 case and of course cannot be sued under a "1983" claim. Most of them testified that they did not even know plaintiff and denied that

they were ever asked by him to do anything for him. There was no allegation or proof of diversity of citizenship as between any of them and plaintiff — only Gleason, President and business agent of the Union, took any active part relating to plaintiff and he did all plaintiff asked and more. On the question of asking for more money he allowed that "fairness in asking for more money is never considered." As to these individual defendant officers of the Union we find that we have no jurisdiction of any kind and the complaint must be dismissed for that reason alone, but if we are in error, the complaint is dismissed for failure to prove any violation under any statute as to them.

It has been suggested that defendants individual members of the School Board have qualified immunity under *Harlow v. Fitzgerald, supra*. That case concerned immunity relating to government officials. But *Wood et al v. Strickland et al*, 420 U.S. 308 (1975), a "1983" action is relevant. We are satisfied that under *Wood* each defendant School Board member has a qualified good faith immunity from liability for damages under both "1983" and the Civil Rights Act of 1964. But they do not need it in this case because plaintiff's case is being dismissed against all defendants for failure of proof.

In sum plaintiff has not been placed by the School Board or any of its members or by the Union or any defendant officers thereof, in a position of violating his religion or losing his job. *Thomas v. Review Board of Indiana*, 450 U.S. 707 (1980); *Shebert v. Verner*, 374 U.S. 398 (1962) and *Hardison, supra*, and his complaint is dismissed against all defendants for failure to prove by a preponderance of evidence.

Accordingly the Clerk is directed to enter judgment dismissing the complaint and enter judgment for all of the defendants with costs.

Let this Memorandum stand as our findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

Thomas F. Murphy
United States District Judge

Dated: May 18, 1984

Appendix D

ORDER, UNITED STATES SUPREME COURT SUPREME COURT OF THE UNITED STATES

No. A-130

ANSONIA BOARD OF EDUCATION, ET AL.,

Applicants,

v.

RONALD PHILBROOK

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION
of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including September 25, 1985.

/s/ Thurgood Marshall
Associate Justice of the Supreme
Court of The United States

Dated this 19th
day of August, 1985

Supreme Court, U.S.

FILED

NOV 5 1985

JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-495

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, ET AL.,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

David N. Rosen
400 Orange Street
New Haven, Connecticut 06511
(203) 787-3513

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that Respondent established a prima facie case of religious discrimination under Title VII by showing that when he was absent because of required religious observance: 1) he was charged for unauthorized leave and docked his salary; and 2) he was prohibited from using any of his annual personal business leave days because defendants' policy explicitly provided that personal business leave days may not be used for "any religious activity"?

2. Did the Court of Appeals err in directing the District Court on remand to consider the reasonableness of the employee's, as well as the employer's, proposals for accommodation?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES	iii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	3
1. The Decision of the Court of Appeals That Respondent Established a Prima Facie Case of Religious Discrimination Is Clearly Correct	3
2. There is No Conflict Between the Holding Below and the Decision of the Tenth Circuit in Pinsker v. Joint District No. 28J	4
3. The Court of Appeals Properly Directed the District Court to Consider the Accommodations Suggested by the Employee and the EEOC As well As by the Employer	5
4. Because Proceedings Are Not Finally Terminated Below, This Case Is Not Appropriate For Review	6
CONCLUSION	7

TABLE OF CASES

Case	Page
Estate of Thornton v. Caldor, Inc., — U.S. —, 105 S.Ct. 2914 (1985)	5
Pinsker v. Joint District No. 28J, 735 F.2d 388 (10th Cir. 1984)	4
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)	5, 6
Wisconsin v. Yoder, 406 U.S. 205 (1972)	4

STATEMENT OF THE CASE

Respondent Ronald Philbrook is a typing and business teacher at Ansonia, Connecticut High School. His religion, the Worldwide Church of God, requires him to abstain from work on certain designated religious holy days, an obligation which causes him to miss approximately six days of work per year. His employer, the Ansonia Board of Education, authorizes three days each year for absence for religious observance, and three days leave each year for "personal business." Teachers are prohibited from using their personal business leave for "any religious activity." The school board has treated Philbrook's absences for religious leave in excess of three per year as "unauthorized," and has docked Philbrook's salary for them, which is the prescribed penalty for unauthorized absence.

After the school board refused to make any accommodation to Philbrook's religious needs which would not result in his absences being considered unauthorized leave, Philbrook complained to both the EEOC and the Connecticut Commission on Human Rights and Opportunities. Both agencies investigated, found probable cause to believe a violation was being committed, and attempted to conciliate. Among the proposals made by the agencies, all of which were accepted by Philbrook and rejected by his employer, were: permitting Philbrook to use his business leave for his religious observance; or permitting him to pay the cost of a substitute (which is considerably less than the amount of pay he is docked for attending religious services) and to perform extra work to make up any time lost.

Philbrook then sued in United States District Court, claiming violation of Title VII and of the Free Exercise Clause. The District Court found that Philbrook had not made out a prima facie case. It made no findings on the issue of his sincerity but found that since he was free to practice his religion, so long as he was willing to accept the penalty imposed by his employer for so doing, there was no showing of discrimination. The Court of Appeals reversed, finding that the District Court had failed to follow the proper proof sequence under Title VII or make the required findings. The Court of Appeals did not reach Philbrook's constitutional claim. By way of guidance on remand, it outlined the standards for establishing a prima facie case of religious discrimination under Title VII, holding that:

A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

9a. Believing that Philbrook had "almost certainly" made out a prima facie case, the Court of Appeals also gave the district judge guidelines for evaluating the reasonable accommodation issue under Title VII; but with respect to all issues it remitted to the trial court in the first instance the task of making appropriate factual inquiry and findings.

REASONS FOR DENYING THE WRIT

1. The Decision of the Court of Appeals That Respondent Established a Prima Facie Case of Religious Discrimination Is Clearly Correct.

Petitioners contend that the standard for establishing a prima facie case of religious discrimination under Title VII is that,

a plaintiff must prove (1) he or she has a bona fide religious belief that conflicts with and employment requirement; (2) he or she has informed the employer of this belief; and (3) he or she was disciplined for failing to comply with the conflicting employment requirement.

Petition for Certiorari 5. But this is precisely the standard applied by the Court of Appeals below. While petitioners claim the court below misapplied this standard, the basis of their allegation is hard to discern.

In this Court petitioners dispute only that Philbrook met the third requirement for establishing a prima facie case, contending that since Philbrook was not fired he was not "disciplined" within the meaning of the Title VII standard. Petition for Certiorari 5-7. But Philbrook was denied his request for authorized leave; his absences were officially "unauthorized;" and the prescribed penalty, docking his pay, was imposed. This discipline is plainly cognizable under Title VII. As the

court below noted, the suggestion that discharge is required to make out a prima facie showing of discrimination flies in the face of Title VII's prohibition of discrimination not only in hiring and firing but also "with respect to compensation, terms, conditions or privileges."

11a. See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (five dollar penalty was a sufficient burden on religion to trigger the protections of the Free Exercise Clause.)

2. There is No Conflict Between the Holding Below and the Decision of the Tenth Circuit in *Pinsker v. Joint District No. 28J*

Petitioners' attempt to show a conflict between the circuits founders because the allegedly conflicting case is plainly distinguishable. In *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984), the Tenth Circuit held that when a school board did permit a teacher to use his personal business leave days for religious observance, it was not obligated to provide the teacher with additional paid leave. So far is this case from being identical with *Pinsker* that the plaintiff's complaint in this case is that he was not given the benefit the plaintiff received in *Pinsker*. Philbrook's complaint in this case is principally that, unlike *Pinsker*, he was not permitted to use his personal leave days for religious observance. Under these circumstances it is hardly surprising that the Tenth Circuit found that the plaintiff teacher there had no complaint, while here the court below held that Respondent had made out at least a prima facie case.

3. The Court of Appeals Properly Directed the District Court to Consider the Accommodations Suggested by the Employee and the EEOC As Well As By the Employer.

Because the trial court had improperly found that Respondent failed to make out a prima facie case, the Court of Appeals remanded the case for consideration and findings, particularly relating to reasonable accommodation. In so doing, it noted that "in many circumstances, more than one accommodation could be called 'reasonable,'" 14a, and it was willing to "presume" that Petitioners' leave policy was reasonable, *id.*, although perhaps not as reasonable as the accommodations which had been proposed by Philbrook, the EEOC, or the Connecticut Commission on Human Rights and Opportunities. The court below observed, however, that *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), made undue hardship a keystone of the analysis of reasonable accommodation and noted that, in considering the reasonable accommodation issue on remand, the trial court should not simply accept the school board's proposal but should consider the impact, and potential hardship, of the accommodations suggested by Philbrook and the government agencies.

Petitioners attempt to distort this reasonable suggestion into an issue meriting review by insisting, contrary to fact, that the court below was postulating some form of absolute right of accommodation, of the kind this Court found unconstitutional in *Estate of Thornton v. Caldor, Inc.*, ___ U.S. ___, 105 S.Ct. 2914 (1985). Of course the court was doing no such thing:

it was simply noting the duty of an employer to avoid penalizing an employee's religious practices if, but only if, it can do so without undue hardship. In doing so it was faithfully following this Court's guidance in Hardison.

4. Because Proceedings Are Not Finally Terminated Below, This Case Is Not Appropriate For Review.

The Court of Appeals reversed the District Court for failing to apply the burden of proof sequence Petitioners agree is appropriate, or to make the findings required under it. 8a-9a. The remainder of the opinion of the Court of Appeals, including all the observations to which Petitioners take exception, were, in the court's words, "guidelines for the case on remand." 9a. Review of the case at this point would therefore be an abstract exercise at best.

As the court below explained, because the District Court improperly failed to reach the issue of reasonable accommodation or to apply the proper standards in determining Philbrook's religious sincerity, remand was necessary so that the District Court could make appropriate factual inquiry and findings. For the Court to intervene at this point, before factual findings have been made about sincerity or reasonable accommodation, would be to require a decision based on speculation about the facts at best and simply an advisory opinion at worst. Petitioners ask the Court to review the Second Circuit's views of reasonable accommodation

without the benefit of any factual findings or inquiry whatever by the trial court on the reasonable accommodation issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

David N. Rosen
400 Orange Street
New Haven, Connecticut 06511
(203) 787-3513

Attorney for Respondent

October 29, 1985

3
No. 85-495

Supreme Court, U.S.

FILED

DEC 12 1985

JOSEPH F. SPANIOLO, JR.
CLERK

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, ET AL,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF OF RESPONDENT ANSONIA FEDERATION
OF TEACHERS IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI**

**ROBERT F. McWEENY
SHERBACOW & McWEENY
638 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-9653**

BEST AVAILABLE COPY

241

QUESTIONS PRESENTED

1. Did the Court of Appeals err in holding that a public school teacher established a prima facie case of religious discrimination under Title VII, where he was provided three days of leave with pay for religious observance and additional days of leave without pay for religious observance?

2. Did the Court of Appeals err, after determining that the employer's accommodation of the employee's religious observance practices was reasonable accommodation, in inquiring whether there were other reasonable accommodations of the employee's religious beliefs which would not create an undue hardship for the employer?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	1
TABLE OF CASES.....	111
STATEMENT OF THE CASE.....	1
REASONS FOR GRANTING THE WRIT.....	4
1. There is a conflict between the Circuit Courts of Appeals with respect to the requirements for a prima facie case of religious discrimination under Title VII of the Civil Rights Act of 1964, as amended 42 U.S.C. section 2000e-2(a) and section 2000e(j).	4
2. The Court of Appeals decision construes Title VII of the 1964 Civil Rights Act, as amended, in a manner which is in conflict with the First Amendment.....	16
CONCLUSION.....	19

TABLE OF CASES

Case	Page
<u>Brener v. Diagnostic Center Hospital</u> , 671 F. 2d. 141 (5th Cir. 1982).....	9,10,11,12,14
<u>Estate of Thornton v. Caldor, Inc.</u> , — U.S. —, 105 S.Ct. 2914 (1985).....	16
<u>Lemon v. Kurtzman</u> , 403 U.S. 602 91 S. Ct. 2105 29 L. Ed. 745 (1971).....	16
<u>McDaniel v. Essex International, Inc.</u> 571 F.2d 388, 341 (1978).....	7
<u>Philbrook v. Ansonia Board of Education</u> , 757 F.2d 476 (2d Cir. 1985).....	5,6
<u>Pinsker v. Joint District Number 28J</u> , 735 F.2d 388 (10th Cir. 1984).....	4,5,6
<u>Transworld Airlines, Inc. v. Hardison</u> , 432 U.S. 63 (1977).....	10,15

STATEMENT OF THE CASE

Respondent, Ronald Philbrook, has been employed by petitioner, Ansonia Board of Education, as a teacher since 1962. In 1968, Philbrook became a member of the Worldwide Church of God, the tenents of which require that members refrain from servile work on designated holy days as a condition of receiving eternal life. As a member of the Worldwide Church of God, Philbrook has been required to refrain from secular employment on up to six days occurring during the school year. Since 1967-68 school year, collective bargaining agreements between the board of education and the Ansonia Federation of Teachers, the union representing members of the Ansonia teachers'

bargaining unit, have entitled Philbrook to three days of paid annual leave to observe religious holidays. Philbrook and other teachers in Ansonia are provided eighteen additional days of paid leave cumulative to 180 days for illness and other enumerated purposes including three days of leave to attend to "necessary personal business". These three days of paid leave, under the terms of the governing collective bargaining agreements, may not be used for those reasons for which paid leave is otherwise provided.

In order to accommodate Philbrook's need to refrain from work on more than three days, the board of education has allowed him to be absent without pay beyond the three days of

paid leave guaranteed under the collective bargaining agreements. From the 1970-71 school year to the present, Philbrook has consistently availed himself of the religious leave sections of the agreement taking three days of paid leave in each school year. It has been the practice of the school board to deduct a day's pay from Philbrook's salary for each day in excess of the three claimed by Philbrook to have been taken for the observance of holidays.

REASONS FOR GRANTING THE WRIT

THERE IS A CONFLICT BETWEEN THE CIRCUIT COURTS OF APPEAL WITH RESPECT TO THE REQUIREMENTS FOR A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII, AND WITH RESPECT TO THE INTERPRETATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED 42 U.S.C. SECTION 2000e-2(A) AND SECTION 2000e(J).

The decision of the Second Circuit below conflicts directly with the Tenth Circuit decision in Pinsker v. Joint District number 28J, 735 F. 2d 388(10th Cir. 1984).

The Respondent-Plaintiff in opposition to this Petition attempted to distinguish the cases on the basis of the use of two days of personal

leave for religious observance in Pinsker, supra as opposed to the use of three days of leave for religious observance in Philbrook v. Ansonia, 757 F. 2d 476 (2d Cir. 1985)

The distinction is meaningless as it affects the critical issues of a Title VII "prima facie" case of religious discrimination and the construction of the reasonable accommodation provisions of Title VII.

In both Pinsker and Philbrook the Complainants, both public school teachers were given unpaid leave after exhaustion of respectively two and three days of paid leave for religious observance.

The Tenth Circuit specifically found at 735 F. 2d 391 that Pinsker had failed to make a prima facie showing of

discrimination. The Second Circuit found on nearly identical legal operative facts that Philbrook had made a prima facie case of religious discrimination under Title VII (see Petition Appendix page 14a).

The conflict is further apparent in the Circuit's construction of the "reasonable accommodation" requirement under Title VII. The Tenth Circuit specifically found in Pinsker, supra that a leave policy providing two days of paid leave for religious observance and additional days of unpaid leave constituted a reasonable accommodation. The Second Circuit in Philbrook (Appendix to Petition 14a) concluded:

"We presume that Ansonia's leave policy is also "reasonable."".

The Tenth Circuit construing the "reasonable accommodation" and "undue hardship" provisions of Title VII in the disjunctive held at 735 F. 2d 390:

"Simply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer."

Citing a Sixth Circuit decision McDaniel v. Essex International, Inc., 571 F. 2d 338, 341 (1978). In construing Title VII in this fashion, the Court realized once a determination had been made that the employer had reasonably accommodated the employees' religious beliefs and practices, then it was not necessary to consider alternative accommodations and their "undue hardship" on the employer. The

issue of "undue hardship" should only be considered when the employer has been unable to reasonably accommodate the employee.

The construction of the "reasonable accommodation" and "undue hardship" provisions by the Second Circuit are articulated (Appendix page 14a) in its decision:

"We presume that Ansonia's leave policy is also "reasonable." And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that the school board has satisfied its burden. The duty to accommodate, however, cannot be defined

without reference to undue hardship.

In many circumstances, more than one accommodation could be called "reasonable." Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless the accommodation causes undue hardship on the employer's conduct of his business."

The Second Circuit's decision goes on to note (Appendix 15a) that their analysis has never been previously articulated, but allege consistent interpretation citing Brener v. Diagnostic Center Hospital, 671 F. 2d

141 (5th Cir. 1982). (Though cited by the Second Circuit as supporting its construction of Title VII, the decision in Brener involved a termination case for failing to report on a day of religious observance. The unquestioned prima facie case in Brener required the Court to discuss whether reasonable accommodation was possible.)

Consistent with its analysis, the Second Circuit went on to consider whether despite the employer's reasonable accommodation, the employee's proposal could be met without undue hardship on the employer. Despite this Court's clear articulation of "undue hardship" in Transworld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) the Second Circuit went on to find no undue hardship under

alternative accommodations proposed by the employee.

The Fifth Circuit decision in Brener v. Diagnostic Center Hospital, 671 F. 2d 141 (1982) cited by the Second Circuit in its decision below; not only does not articulate the analysis of the Second Circuit, but suggests a third construction by a Circuit Court of Appeals of the "reasonable accommodation" language of Title VII.

In Brener the Fifth Circuit held at 671 F. 2d 146:

"Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by

the employer. A reasonable accommodation need not be on the employees' terms only."

The Court having concluded that Brener had established a prima facie case (he was terminated for refusing to show up for work on a religious holiday), considered whether the employer had "reasonably accommodated" his religious practices. In determining whether the employer had attempted to reasonably accommodate Mr. Brener the Fifth Circuit considered the employee's proposed solutions; and found that they would have a detrimental impact on the the employer's business.

It is not apparent from such decision that the Fifth Circuit would have on the facts of the instant case (the only discipline alleged is the

unpaid leave for the days not worked) gone beyond a finding of reasonable accommodation.

It may very well be that the current state of the law amongst the Circuit Courts of Appeals involves three approaches to the "reasonable accommodation" and "undue hardship" provisions of Title VII. The Tenth Circuit approach involves an initial determination of whether the employer has reasonably accommodated the employees' religious beliefs and practices. If the employer has reasonably accommodated such interests, the analysis goes no further. If the employer has been unable to reasonably accommodate the religious practices, the issue then becomes whether the proposed accommodations would impose

undue hardship on the employer's business. The Second Circuit in its decision below, requires an employer, whether or not they have reasonably accommodated the employees' religious practices; to determine whether any of the employees' proposed accommodations would impose an undue hardship on the employer's business. The Fifth Circuit in Brener v. Diagnostic Center Hospital, supra, suggests that undue hardship is the measure of whether the employer has reasonably accommodated its employees' religious practices. The Fifth Circuit contrary to the Second Circuit, finds a "correlative duty" of the employee to make a good faith attempt to satisfy his needs through a means offered by the employer.

The Tenth Circuit and Fifth Circuit decisions seem consistent with this Court's holding in Transworld Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) wherein there was a discharge for refusal of the employee to report on a day in which he observed his religious practices. The District Court Decision ultimately upheld by this Court in Transworld Airlines, Inc., supra, involved a finding that the employer had attempted reasonable accommodations, and that further accommodations would have worked an undue hardship.

In view of the apparent conflict between the Circuits it is necessary that this Court specifically address the issue of the application of the standards of "reasonable accommodation"

and "undue hardship" under Title VII.

THE COURT OF APPEALS DECISION CONSTRUES
TITLE VII OF THE 1964 CIVIL RIGHTS ACT,
AS AMENDED, IN A MANNER WHICH IS IN
CONFLICT WITH THE FIRST AMENDMENT

This Court in its recent decision
in Estate of Thornton v. Caldor, Inc.

—U.S.—, 105 S.Ct. 2914 (1985)
reaffirms that a statute in order to
pass constitutional muster under the
establishment clause, must not only
have secular purpose and not foster
excessive entanglement of government
with religion; but its primary effect
must not advance religion. Lemon v.
Kurtzman, 403 U.S. 602, 91 S. Ct. 2105,
29 L. Ed. 2d 745 (1971). The
Connecticut Statute which created an

absolute accommodation requirement with
respect to "Sabbath" observance was
found to have promoted or advanced
religious practices.

In her concurring opinion Justice
O'Connor (with whom Justice Marshall
joined) noted at 105 S. Ct. 2919 in
dicta that Title VII should stand
constitutional muster under the
establishment clause since it calls for
a reasonable rather than absolute
accommodation.

If the employer must not only
reasonably accommodate the employee's
religious practice; but go further and
accept any proposal by the employee
with respect to accommodation, unless
the employer can establish that it
would cause "undue hardship" to its
business; the advancement of religion

is clearly at issue.

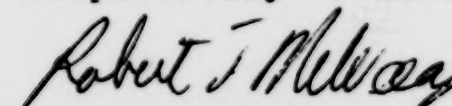
If the employer under Title VII is obligated to provide to employees additional benefits because of their religious practices (additional days leave, the right to work other than during the normal work week or work year) discrimination in the form of termination because of religious practices, or substantial interference with religious practices is not involved. What is at issue is a governmental requirement that facilitates religious practices and "advances" religion. This is clearly prohibited by the establishment clause.

The Court should grant the Writ in this case to insure that Title VII is construed and applied in a manner which is constitutionally permissible.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

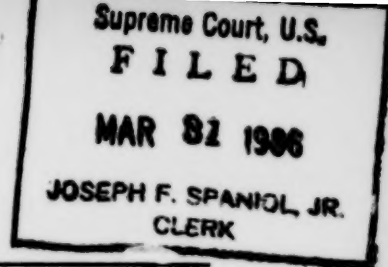
Respectfully Submitted,



Robert F. McWeeny
SHERBACOW & McWEENY
638 Prospect Avenue
Hartford Connecticut 06105

Attorney for Respondent
Ansonia Federation of
Teachers and Jose Neves,
Kathleen Roberts,
Mary Ghirardini,
Dennis Gleason,
Domenick Brogolia,
Maureen Wilkinson and
Georgette Williams

(H)
No. 85-495



In The
Supreme Court of the United States
October Term, 1985

— 0 —
ANSONIA BOARD OF EDUCATION,
NICHOLAS COLLICELLI,
DR. CHARLES J. CONNORS, KENNETH EATON,
WILLIAM EVANS, DEL MATRICARLA,
SUSAN SCHUMACHER, FAITH TINGLEY,
AND ROBERT E. ZURAW,

Petitioners,

v.

RONALD PHILBROOK,

Respondent.

— 0 —
**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

— 0 —
JOINT APPENDIX
— 0 —

(All counsel listed on inside cover.)

**Petition For Certiorari Filed September 20, 1985
Certiorari Granted January 21, 1986**

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

200 PP

THOMAS N. SULLIVAN*

ROBERT J. MURPHY

LESLIE A. COLLINS

646 Prospect Avenue

Hartford, Connecticut 06105 (203) 787-3513

(203) 233-2141

Attorneys for Petitioner

Ansonia Board of Education

and the Individual School

Board Defendants

ROBERT F. McWEENY*

638 Prospect Avenue

Hartford, Connecticut 06105

(203) 233-9653

Attorney for Respondent

Ansonia Federation of

Teachers and the

Individual Union Defendants

DAVID N. ROSEN*

400 Orange Street

New Haven, Connecticut

06511

Attorney for Respondent,

Ronald Philbrook

*Counsel of Record

TABLE OF CONTENTS

	PAGE
Relevant Docket Entries in the District Court	1
Relevant Docket Entries in the Court of Appeals for the Second Circuit	2
Complaint of Ronald Philbrook Filed in the District Court on December 16, 1977	3
Answer of the Ansonia Federation of Teachers and the Individual Union Defendants filed in the District Court on February 21, 1978	9
Amended Answer of the Ansonia Board of Education and the Individual School Board Defendants filed in the District Court on October 21, 1983	12
Transcript of Proceedings (excerpts) in the District Court on December 12 & December 13, 1983	15
Plaintiff's Exhibit 1 (excerpts of leave provisions in the Collective Bargaining Agreement effective from May 3, 1966 to May 2, 1967)	71
Plaintiff's Exhibit 2 (excerpts of leave provisions from the Collective Bargaining Agreement effective from May 29, 1967 to June 30, 1968)	73
Plaintiff's Exhibit 3 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1968 to June 30, 1969)	75
Plaintiff's Exhibit 4 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1969 to June 30, 1970)	76
Plaintiff's Exhibit 5 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1970 to June 30, 1971)	79
Plaintiff's Exhibit 6 (excerpts of leave provisions from the Collective Bargaining Agreement effective from December 11, 1971 to June 30, 1972)	82

TABLE OF CONTENTS—Continued

PAGE

Plaintiff's Exhibit 7 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1972 to June 30, 1974)	85
Plaintiff's Exhibit 8 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1974 to June 30, 1975)	88
Plaintiff's Exhibit 9 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1975 to June 30, 1978)	91
Plaintiff's Exhibit 10 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1978 to June 30, 1982)	94
Plaintiff's Exhibit 11 (excerpts of leave provisions from the Collective Bargaining Agreement effective from July 1, 1982 to June 30, 1985)	98
Plaintiff's Exhibit 15 (excerpts of Philbrook's salary data from September 1, 1983 to August 31, 1984)	102
Plaintiff's Exhibit 16 (excerpts from the investigative file of the Connecticut Commission on Human Rights and Opportunities)	102
Plaintiff's Exhibit 19 (summary of substitute rates in the Ansonia School System)	124
Defendant, Ansonia Board of Education Exhibit B (letter from James J. Rosenthal to Bruce Julianelle dated February 11, 1974)	125
Defendant, Ansonia Board of Education Exhibit C (excerpts from the deposition of Robert E. Zuraw)	127
Defendant, Ansonia Federation of Teachers Exhibit BB (Arbitration Award)	170
Defendant, Ansonia Federation of Teachers Exhibit FF (excerpts from the deposition of Ronald Philbrook)	178

TABLE OF CONTENTS—Continued

Page

Note: The decision of the District Court and the Court of Appeals for the 2nd Circuit are contained in the Appendix to the Petition for Writ of Certiorari. These two decisions are listed below with the designation "App." which refers to that petition.

<i>Philbrook v. Ansonia Board of Education, et al</i> , Docket No. 77-489 (D.Conn. May 18, 1984)	App. 26
<i>Philbrook v. Ansonia Board of Education, et al</i> , Docket No. 84-7548 (2d Cir. March 7, 1985)	App. 1

**RELEVANT DOCKET ENTRIES IN THE
DISTRICT COURT**

DATE NR. PROCEEDINGS

12/16/77 1 Complaint filed.
2/03/78 7 Answer of School Board Defendants filed.
2/21/78 8 Answer of Ansonia Federation of Teachers and Individual Union Defendants filed.
10/21/83 40 Amended Answer filed.
12/12/83 Court trial commences: Plaintiff's Exhibits 1-23 filed; Defendants' Exhibits A-D, AA-FF filed; nine witnesses testify.
12/13/83 Court trial continued.
5/22/84 55 Memorandum issued ordering clerk to enter judgment dismissing the complaint and to enter judgment for Defendants with costs.
5/22/84 56 Judgment entered in favor of the Defendants dismissing this action, with their costs.
6/20/84 60 Notice of Appeal filed by Plaintiff.

RELEVANT DOCKET ENTRIES IN THE
COURT OF APPEALS FOR THE
SECOND CIRCUIT

DATE PROCEEDINGS

- 6/25/84 Copy of District Court Docket entries and Notice of Appeal on behalf of Appellant Philbrook filed.
- 7/23/84 Record on Appeal filed.
- 9/24/84 Appellant Philbrook brief filed.
- 10/24/84 Appellees' Ansonia Federation of Teachers, *et al.*, brief filed.
- 10/29/84 Appellees' Ansonia Board of Education, *et al.*, brief filed.
- 11/14/84 Case heard before: Oakes, Kearsse C.J.J., Pollack D.J.
- 3/07/85 Judgment reversed and remanded by published opinion signed per J.L.O.
- 3/07/85 Dissenting published opinion signed by Judge Pollack.
- 3/07/85 Judgment filed.
- 3/19/85 Appellees' Ansonia Board of Education and Individual School Board Defendants' Motion for Extension of Time Within Which to File Petition for Re-hearing filed.
- 4/15/85 Appellees' Ansonia Board of Education, *et al.*, Petition for Re-hearing with Suggestion for Re-hearing *en banc* filed.
- 6/07/85 Order denying Appellees' Ansonia Board of Education, *et al.*, Petition for Re-hearing with Suggestion for Re-hearing *en banc* filed.
-

PLAINTIFF'S COMPLAINT FILED IN THE
DISTRICT COURT ON DECEMBER 16, 1977

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

RONALD PHILBROOK,

Plaintiff

VS.

ANSONIA BOARD OF EDUCATION, and NICHOLAS COLLICELLI, DR. CHARLES J. CONNERS, KENNETH EATON, WILLIAM EVANS, DEL MATRICARIA, and SUSAN SCHUMACHER (as President), and FAITH TINGLEY (as Secretary), individually and as members of said Board, ROBERT E. ZURAW, individually and as Superintendent of the Ansonia School System, and ANSONIA FEDERATION OF TEACHERS, LOCAL 1012, AFL-CIO, and JOSE NEVES, KATHLEEN ROBERTS, MARY GHIRARDINI, DENNIS GLEASON, DOMINICK BROGOLIA, MAUREEN WILKINSON, and GEORGETTE WILLIAMS, individually and as officers of said Local,

Defendants

COMPLAINT

(Filed December 16, 1977)

INTRODUCTION AND JURISDICTION

1. Plaintiff, a schoolteacher, brings this employment discrimination and First Amendment action against his employer and labor union to redress the injuries done to him on account of his exercise of his religious beliefs. The defendants have caused plaintiff to lose pay for days he

is required to be absent from work for religious observances, although no pay is deducted for absences for non-religious personal business.

2. This action is brought pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq., as amended, and 42 U.S.C. § 1983. Jurisdiction is conferred upon this Court by 28 U.S.C. §§ 1331 and 1343 and by 42 U.S.C. § 2000e-5(f).

3. The amount in controversy exceeds the sum of \$10,000, exclusive of interest and costs.

4. The jurisdictional prerequisites to suit under Title VII have been satisfied. On or about November 7, 1973, plaintiff filed complaints with the Equal Employment Opportunity Commission and the Connecticut Commission on Human Rights and Opportunities. On November 5, 1976, the EEOC determined "that there is reasonable cause to believe that the Respondent Employer and Respondent Union are parties to a collective bargaining agreement which discriminatorily precludes the use of annual leave for religious observances, and that Respondent Union has failed to represent Charging Party, both of which constitute violations of Title VII." Thereafter the EEOC unsuccessfully attempted conciliation, and the United States Department of Justice issued a Notice of Right to Bring Suit With 90 Days, which was received by plaintiff on or about September 22, 1977.

PARTIES

5. Plaintiff has taught in the Ansonia school system for fifteen and one-half years and now teaches business

in high school. He is forty-two years old, married, the father of four children, and a veteran of military service. He has for ten years been a baptized member of the Worldwide Church of God, a branch of Christianity. He is a citizen of the United States and a resident of Ansonia, Connecticut.

6. a) The Defendant Ansonia School Board is plaintiff's employer. It administers and governs the Ansonia public school system pursuant to the statutes and laws of the State of Connecticut. As such it is a party to the employment contracts which govern plaintiff's pay and conditions of work.

b) Defendants Nicholas Collicelli, Dr. Charles J. Conners, Kenneth Eaton, William Evans, Del Matricaria, and Susan Schumacher (as President) are the members of the Board, and defendant Faith Tingley is its Secretary. These defendants are sued individually and as the members of the Board.

c) Defendant Robert E. Zuraw is the Superintendent of the Ansonia School System. As such he is the chief operating administrator of the School System with responsibility for interpreting, applying and enforcing the employment contract governing plaintiff, and with the Board of Education, participates in determining the terms and conditions of plaintiff's employment. He is sued individually and in his official capacity.

d) The Defendant Ansonia Federation of Teachers, Local 1012 AFL-CIO, ("the Union") is the authorized bargaining agent for all teachers in the Ansonia School System and as such negotiates the contracts which de-

termine the terms and conditions of plaintiff's employment.

e) Defendants Jose Neves (President), Kathleen Roberts (First Vice President), Mary Ghirardini (Second Vice President), Dennis Gleason (Business Agent), Georgette Williams (Corresponding Secretary), Maureen Wilkinson (Recording Secretary), and Dominick Brogolia (Treasurer) are the officers of the Union, and as such they are responsible for formulating and implementing its policy and negotiating contracts on its behalf. These defendants are sued individually and in their official capacities.

FACTUAL BACKGROUND

7. As part of the practice of his religion, plaintiff is required to observe certain annual Holy Days, which are determined by his church in accordance with its doctrine. Approximately five to ten of these days each year fall on days school is in session. Plaintiff cannot work on these days and must attend church.

8. When plaintiff joined the Worldwide Church of God, he was able to use his annual personal leave time for observance of his church's Holy Days. However the defendants Board of Education and Union thereafter negotiated a contract (which has remained unchanged in relevant respects until the present) under which plaintiff is not permitted to use his personal leave time for religious observance.

9. The relevant provisions of the contract allow three days each year for religious observance. In addition to this time, however, eighteen days are permitted for per-

sonal and sick leave, of which, for example, three may be spent in attendance as an official delegate to a National Veterans' Organization, but may not be spent for religious observance, and an additional three may be spent for "legitimate and necessary personal business at the teacher's discretion . . . [but] shall not include . . . any religious activity."

10. As a result of these provisions, plaintiff has been docked his salary for each of the days he has been required to miss for religious observance, although he has not taken his full allotment of annual leave and has at all times expressed his willingness to have his days of religious observance deducted from his personal leave days. Moreover, he has been docked the full amount of his days' pay although the cost of obtaining a substitute teacher on these days is much less than the amount plaintiff has been docked.

FIRST CLAIM: DISCRIMINATION IN EMPLOYMENT

11. The practices and policies outlined above, which have been joined and formulated by the defendants, operate to deprive plaintiff of equal employment opportunity on account of his religion, in violation of 42 U.S.C. 2000e-2 (a) and (c), and defendant Union has failed to assist plaintiff fully in gaining relief from these unlawful practices.

SECOND CLAIM: DEPRIVATION OF RELIGIOUS FREEDOM

12. The policies and practices outlined above have operated to deprive plaintiff of his right to the free exercise of his religion and have operated as an establishment

of religion, in violation of the First and Fourteenth Amendments to the United States Constitution.

DAMAGES

13. As a result of the deprivations of rights described above, plaintiff has lost income and been deprived of equal employment opportunity and has been penalized for his exercise of his religion.

WHEREFORE PLAINTIFF CLAIMS:

1. A temporary and permanent injunction requiring defendants to permit plaintiff to exercise his religion without financial penalty or deprivation of equal employment opportunity.

2. A declaratory judgment that the practices of the defendants are illegal and unconstitutional.

3. Damages, in excess of \$10,000., exclusive of interest and costs, in such amount as is warranted by the evidence.

4. Backpay.

5. Costs, including a reasonable attorneys' fee.

6. Such other and further relief as is warranted by the evidence and appears just to the Court.

THE PLAINTIFF

By /s/ David N. Rosen
265 Church Street
New Haven, Connecticut 06510
His Attorney

ANSWER OF THE ANSONIA FEDERATION OF TEACHERS AND THE INDIVIDUAL UNION DEFENDANTS FILED IN THE DISTRICT COURT ON FEBRUARY 21, 1978

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

NO. N-77-489

RONALD PHILBROOK,

Plaintiff

vs.

ANSONIA BOARD OF EDUCATION, ET AL
Defendants

ANSWER

FEBRUARY 16, 1978

1. That portion of paragraph 1 which alleges that this action is being brought by the plaintiff, a schoolteacher, against his employer is admitted. The remainder of paragraph 1 is denied.

2. That portion of paragraph 2 which alleges that this action is brought under 42 U.S.C. §§ 2000e, et seq., as amended, and 42 U.S.C. § 1983 is admitted. The remainder of paragraph 2 is denied.

3. Paragraphs 3, 4, 8, 9, 11, 12 and 13 are denied.

4. The first sentence of paragraph 5 is admitted. As to the remainder of paragraph 5, the defendants have insufficient knowledge upon which to form a belief and therefore leave the plaintiff to his proof.

5. Paragraphs 6(a) (b) and (d) are admitted.

6. The first sentence of paragraph 6(c) is admitted. As to the remainder of paragraph 6(c), the defendants have insufficient knowledge upon which to form a belief and therefore leave the plaintiff to his proof.

7. That portion of paragraph 6(e) which alleges that Defendants Jose Neves, Kathleen Roberts, Mary Ghirardini, Dennis Gleason, Georgette Williams, Maureen Wilkinson and Dominick Golia are officers of the Union and that they are sued individually and in their official capacities, is admitted. The remainder of paragraph 6(e) is denied.

8. As to paragraph 7, the defendants have insufficient knowledge upon which to form a belief and therefore leave the plaintiff to his proof.

9. As to paragraph 10, the defendants have insufficient knowledge upon which to form a belief and therefore leave the plaintiff to his proof.

FIRST DEFENSE

The complaint fails to state a claim against the defendants upon which relief can be granted.

SECOND DEFENSE

The right of action set forth in the complaint and brought pursuant to 42 U.S.C. § 1983 did not accrue within three years next before the commencement of this action.

THIRD DEFENSE

The right of action set forth in the complaint and brought pursuant to 42 U.S.C. §§ 2000e, et seq., did not

accrue within ninety (90) days next before the commencement of this action.

FOURTH DEFENSE

The right of action set forth in the complaint and brought pursuant to 42 U.S.C. §§ 2000e, et seq., was not commenced within a reasonable and proper period of time to the prejudice of the defendants.

DEFENDANTS, ANSONIA FEDERATION OF
TEACHERS Local 1012, AFL-CIO, JOSE NEVES,
KATHLEEN ROBERTS, MARY GHIRARDINI,
DENNIS GLEASON, DOMINICK GOLIA,
MAUREEN WILKINSON and GEORGETTE
WILLIAMS

By /s/ Joseph P. Flynn

(Certificate of Service Omitted)

AMENDED ANSWER OF THE
ANSONIA BOARD OF EDUCATION AND
THE INDIVIDUAL SCHOOL BOARD
DEFENDANTS FILED IN THE DISTRICT COURT
ON OCTOBER 21, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CIVIL NO. N-77-489

RONALD PHILBROOK,

Plaintiff

vs.

ANSONIA BOARD OF EDUCATION, ET AL,
Defendants

AMENDED ANSWER
OCTOBER 18, 1983

1. Paragraphs 1, 3, 4, 8, 9, 10, 11, 12 and 13 are denied.
2. That portion of paragraph 2 of the Complaint which alleges that this action is brought under 42 U.S.C. §§ 2000e, et. seq., as amended and 42 U.S.C. § 1983 is admitted. The remainder of paragraph 2 is denied.
3. The first sentence of paragraph 5 is admitted. As to the remainder of paragraph 5, the defendants have insufficient knowledge upon which to form a belief and therefore leave the plaintiff to his proof.
4. Paragraphs 6(a)(b) and (d) are admitted.
5. As to paragraphs 6(e) and 7, the defendants have insufficient knowledge upon which to form a belief and therefore leave the plaintiff to his proof.

6. As to paragraph 6(c), defendants admit the first and third sentence. The remainder of paragraph 6(c) is denied.

FIRST DEFENSE

The Complaint fails to state a claim against the defendants upon which relief can be granted.

SECOND DEFENSE

The right of action set forth in the Complaint and brought pursuant to 42 U.S.C. § 1983 did not accrue within three years next before the commencement of this action.

THIRD DEFENSE

The right of action set forth in the Complaint and brought pursuant to 42 U.S.C. §§ 2000e, et. seq., did not accrue within ninety (90) days next before the commencement of this action.

FOURTH DEFENSE

The right of action set forth in the Complaint and brought pursuant to 42 U.S.C. §§ 2000e, et. seq., was not commenced within a reasonable and proper period of time to the prejudice of the defendants.

FIFTH DEFENSE

The individual defendants acted in good faith at all times material to the Complaint and are therefore immune from personal liability.

DEFENDANTS, ANSONIA BOARD OF
EDUCATION, NICHOLAS COLLICELLI, DR.

CHARLES J. CONNERS, KENNETH EATON,
WILLIAM EVANS, DEL MATRICARIA, SUSAN
SCHUMACHER (as President) and FAITH
TINGLEY (as Secretary), individually and as
members of said Board and ROBERT E. ZURAW
individually and as SUPERINTENDENT OF
ANSONIA SCHOOL SYSTEM.

By /s/ Thomas N. Sullivan
of
Sullivan, Lettick & Schoen
646 Prospect Street
Hartford, Connecticut 06105
Juris # 62326

(Certificate of Service Omitted)

TRANSCRIPT OF PROCEEDINGS
IN THE DISTRICT COURT
(EXCERPTS) ON DECEMBER 12 AND
DECEMBER 13, 1983
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil No. N-77-489

RONALD PHILBROOK,

Plaintiff,

vs.

ANSONIA BOARD OF EDUCATION, ET AL.

Defendants.

Federal Building
14 Cottage Place
Waterbury, Connecticut

TRIAL

Volume 1

December 12, 1983

Before:

THE HON. THOMAS F. MURPHY, U.S.D.J.
(Sitting by Designation)

Appearances:

For the Plaintiff:

ROSEN & DOLAN
400 Orange Street
New Haven, Connecticut 06510
By: DAVID N. ROSEN, ESQUIRE

Appearances (Continued):

For the Defendant Board of Education and Individual Board Members:

SULLIVAN, LETTICK & SCHOEN

632 Prospect Avenue

Hartford, Connecticut 06105

By: THOMAS N. SULLIVAN, ESQUIRE
ROBERT J. MURPHY, ESQUIRE

For the Defendant Federation of Teachers:

FLYNN & SHEEHY

303 Wakelee Avenue

Ansonia, Connecticut 06401

By: JOSEPH P. FLYNN, ESQUIRE

(p. 1-9) RONALD PHILBROOK, called as a witness by the Plaintiff, being first duly sworn by the Clerk, was examined, and testified on his oath as follows:

The Clerk: Please be seated. Would you state your name and spell your last name for the record.

The Witness: Ronald Philbrook, P-h-i-l-b-r-o-o-k.

The Clerk: Your home address?

The Witness: Twenty-six Multhrop Street, Ansonia, Connecticut.

Mr. Rosen: Does your Honor have a preferred location for counsel to stand?

The Court: No, any place that's convenient for yourself.

Mr. Rosen: Thank you.

The Court: Most lawyers can remain on the side there if they want.

Mr. Rosen: Sounds convenient.

The Court: The Court Reporter asked us all to keep our voices up. She has a bad cold, and it's affecting her hearing.

DIRECT EXAMINATION

(p. 1-10) Q Mr. Philbrook, you are the Plaintiff in this action, is that correct?

A Yes.

Q Are you employed by the Ansonia Board of Education?

A Yes.

Q What's your job?

A I'm a business teacher.

Q What school do you teach at, sir?

A Ansonia High School.

Q For how many years have you taught there?

A Approximately 22.

Q In the 1960's, did you and your family become religiously involved with the Worldwide Church of God?

A Yes, sir.

Q What is the Worldwide Church of God, sir?

A The Worldwide Church of God is a Christian group who redeems its teachings from the Scriptures as its doctrine.

Q Did you at some point become baptized in that church?

A Yes.

Q What year was that, if you recall?

A I believe it was February of 1968.

Q Since that time or even prior thereto, have you (p. 1-11) adhered to the beliefs of this church?

A Yes, sir, I have.

Q Is the Worldwide Church of God an organized religion with congregations in your community and elsewhere?

A They are scattered around the world; not in my community, no.

Q Can you tell me, sir, what the teachings are as you understand them with respect to work on designated holy days?

A From what I understand, there is no type of work that has to do with earning the living — the means of earning the living that should be done on those days that are known as holy convocation or special holy days.

Q Is this what's known as secular work?

A Work that has to do with earning a living.

Q This is according to the teachings of the church to which you belong?

A Yes, sir.

Q Showing you Plaintiff's Exhibit 12, can you identify that booklet?

A Yes.

Q What is it?

A It's a booklet that was printed by the church quite sometime ago. That has to do with a calendar used primarily to determine certain holy days and so on and the (p. 1-12) meanings of them and bringing it to a spiritual sense, also.

Q Does that booklet contain actual written church doctrine?

A It is primarily to be used by newer members to give them an idea of what it would be. Whether it's a primary doctrine, I don't know. It's been a long time since I've read it.

Q Is the material in that booklet part of the beliefs and doctrines of the church?

A It certainly is.

Q These holy days to which you've referred, would you outline for his Honor just what those days are?

A They are divided up into several areas. It's a Passover of that time of the year in the Spring area. From the Passover, it goes into the Days of Unleavened Bread. These are just names of the days. Then from the Days of Unleavened Bread, you come into the Days of Pentecost. From the Days of Pentecost, I believe it goes into the Feast of Trumpets, and from the Feast of Trumpets, the next holy day would be a Day of Atonement, and then on comes the Day of the Feast of Tabernacles which ends with the last Grace day. These holy days picture a certain teaching of Christ and its spiritual significance which will occur later on in the New Testament.

Q For purposes of work, do all of these holy days (p. 1-13) fall on the same days of the week each year?

A No, sir.

Q So, then, is the number of days during which you are required to abstain from secular work somewhat variable from year to year?

A They are.

Q Can you tell us approximately what that variation is, what the range of that variation is?

A I think in most cases, it would vary from three to perhaps six days, approximately.

Q It's possible for it to be somewhat more?

A It's possible on some occasions I would think.

The Court: Do I understand you to mean that at the most there would be six holy days?

The Witness: It's possible, your Honor. It might be more than those certain days, I'm not really positive.

The Court: On the average?

The Witness: On the average, I would guess approximately up to six.

By Mr. Rosen:

Q Plaintiff's Exhibit 13, Mr. Philbrook, can you tell us in a few words what that booklet contains?

A This particular booklet before me now actually contains information based on the Roman calendar and how (p. 1-14) certain days came into existence such as Good

Friday, Easter, Christmas and some of these other days, how they are particularly mentioned in certain manuscripts of the Scriptures and in the original manuscripts and how they compare with what we in the Church of the God Worldwide consider God's holy days as outlined in Leviticus, Deuteronomy, Exodus, as far as the Old Testament is concerned, and as the Apostles were taught in teaching others in Christianity in the Book of Acts and even Christ's Gospels; himself, and Matthew, Luke, John, and the Apostle Paul and others, and, for instance, in the Corinthians, in the Book of Acts which is basically an outline of the Church's transition from the Old Testament to the New, and its history.

Q So, does Exhibit 13 contain a description of some of the doctrine of your church with respect to honoring these holy days?

A Yes, sir, it does.

Q Now, after you joined the Worldwide Church of God, did you commence the practice of abstaining from secular work or work as a school teacher on the holy days?

A Yes, sir.

Q Did you inform your superiors within the School System of your religious obligations?

A Yes.

(p. 1-15) Q What happened to you in consequence of this information and your practices?

A It has been a long time, but if I can remember correctly, I believe that at first it had no bearing on my leave time, that I was able to take them off, regular leave,

until I believe the Federation came into existence and a contract took place.

Q Federation referring to what group?

A The Federation of Teachers.

Q Then what happened? Approximately what year was that?

A I don't remember exactly.

Q But, what happened after or when the Federation came into effect and there was a contract?

A I was no longer allowed to take four or five days based on the annual leave time. I began to be docked a certain amount of money per day.

Q Did you file a complaint of religious discrimination with the Equal Employment Opportunity Commission and the Connecticut Commission on Human Rights and Opportunities?

The Court: Counsel, he wouldn't be here if he didn't. Don't you have to do that first?

Mr. Rosen: Yes.

By Mr. Rosen:

(p.1-16) Q As a result of your complaint, can you describe what proceedings took place with respect to the issue of conciliation of your complaint?

A From 1973 when I first issued a complaint up to, I believe, '75, we had conciliation offers of agreements, but couldn't seem to get them to come to pass, you know, they were offered by the Commission on Human Rights

and, I believe, also the E.E.O.C. in '75. We had an arbitration. The Federation was offering for me. We lost that arbitration, but I was under the opinion that the Federation was backing me and thought that the intention of the contract wasn't as it was expected to be which is why they went into arbitration for me. Since that time, the Federation has not made any effort to do anything for the contract pertaining to this particular situation.

Q With respect to possibly conciliating this dispute, did you or the agencies to your knowledge make various suggestions of possible conciliations?

A I have.

Q Would you tell the Court what some of those suggestions are?

A From the very beginning, my offer was to pay the substitute's pay if I had to take days for religious observance that were not to be considered part of the contract for days off; accumulative leave.

(p. 1-17) Q To explain that, when you are absent—

The Court: I understand that.

By Mr. Rosen:

Q Is your pay significantly higher than a substitute's pay?

A Yes, sir. It was considered, I believe, at one time it might have been one two-hundredths of a year's salary and then later reduced to one one eightieth of a year's salary which became a considerable amount of money as the years went by, and my salary increased.

Q In addition to that proposal, were there any other proposals you were agreeable to to accommodate your needs as well as the Defendants'?

A Other suggestions that I offered were not to be allowed. The three days placed into the contract for religious observance that I was told was for the religious purpose of the Jewish population at that time in excess of three days of the year not to be deducted from annual leave. I offered to not have those three days, that I would just assume have all days taken from the annual leave off my time. The other one—

The Court: I'm wondering whether all these efforts of conciliation is relevant for me.

Mr. Rosen: The reason I'm offering this evidence, your Honor, is on the issue of reasonable (p. 1-18) accommodation.

The Court: Aren't we past that? The E.E.O.C. said you could sue.

Mr. Rosen: Yes, but the Defendants' obligation of reasonable accommodation is violated if they failed to make some reasonable effort—

The Court: You mean after the E.E.O.C. finished or before?

Mr. Rosen: At either point.

The Court: How long does it continue? What's the purpose of me sitting here?

Mr. Rosen: It has to do with prospective versus retrospective relief. If Defendants made a reasonable ac-

commodation, I suppose it would have no basis for prospective relief, but we claim both retrospective and prospective relief.

By Mr. Rosen:

Q In addition to taking away the special authorized leave and putting it all on annual leave, paying the substitute, were there any other proposals you can think of as you sit here?

A I had from year to year offered suggestions to the contract in writing so that it may be treated as other portions of the contract on personal leave time. I offered to make up any work if possible.

(p. 1-19) Q You were docked pay you've testified, Mr. Philbrook, but since the school year 1976-77, have you been docked any pay?

A No, not to my knowledge.

Q What is the reason for that?

A When I started to lose a considerable amount of money and my family began to drool, I couldn't afford to lose such an amount. I began to compromise so to speak. I would set up on appointment where I should have been in church observance either for the V.A. Hospital or for other medical reasons or just regular general sickness that may have occurred.

Q When you say you had set up an appointment, was this something you were obligated to do, to go to the V.A.?

A Yes.

Q Do you have other medical problems as a disabled veteran that makes you have to miss school days in any event?

A Yes, I do.

Q So, you schedule them on a religious holy day?

A Yes.

Q And then, in fact, did you also on some occasions actually go to work on a religious holy day?

A Yes, I have.

Q Do you regard that as a belief of your religious (p. 1-20) obligations?

A I certainly do.

Q How many days have you gone would you estimate?

A I really don't know how many. I would guess approximately six or so that may have fallen on school days.

Q Have you ever to the best of your recollection taken any personal business days for religious observance?

A Not that I can recall, no.

Q Why is that?

A The reason was I was trying to be in complete honesty with the contract; this is why I ended up going into work when I felt that I shouldn't be, because I didn't want to put down illness or whatever when it wasn't the case at that time.

Q Is it your understanding of the contract that you cannot use personal business days for religious holidays?

A I was told I couldn't.

Q As far as you can recall, have you ever taken any personal business days for any reason?

A I just don't remember.

Q Do you remember ever having taken a personal business day?

A I'm sure I have, but it must have been sometime ago.

Q Within the last six or seven days have you?

(p. 1-21) A I don't think so that I can recollect.

Q You have a fixed amount of annual leave as part of the contract, is that right?

A Yes.

Q Can you accumulate annual leave?

A Yes.

Q Do you have any accumulated annual leave?

A Yes.

Q Approximately how many days do you have?

A Approximately 80.

Mr. Rosen: May I have just a moment, your Honor, to see if I have any additional questions?

(Pause.)

Mr. Rosen: No further questions.

The Court: Any cross?

CROSS-EXAMINATION

By Mr. Flynn:

Q Mr. Philbrook, do you remember what date you became a member of the Worldwide Church of God?

A I became a member in February of '68, I believe.

Q Was there some special event that affirmed your membership? How did you know you had become a member in February of '68?

A I felt I became a member at that time through baptism.

(p. 1-22) Q Are you still a member of this church?

A Yes, sir.

Q Does it have a church building?

A Not a particular church building for special purposes, no.

Q These holy days that are the subject of this lawsuit, where do you observe them?

A They can be in various—

The Court: No, the question is where do you observe them?

The Witness: Where do I observe them?

The Court: That's what he wanted to know.

The Witness: I observe them at times in the location of the church where it would meet or at home, or if I was to be at the hospital or wherever, I would observe it there.

By Mr. Flynn:

Q Well, on those days where you did not observe these holy days at the hospital or at your own home, where have you observed them, for example, other than those two in the year of 1983?

A It could be—

Q I'm asking specifically where?

A In Wallingford.

The Court: He wants the name of the place. (p. 1-23) Was it a street corner or hotel or restaurant or church, or cemetery?

A Well, we used the school.

The Court: He wants to know where you observed these holy days during '83 was it?

Mr. Flynn: That's correct.

The Witness: A couple of them in Meriden, the Junior Middle School; I believe that's what it's called.

By Mr. Flynn:

Q Were there other places?

A There were other places when I was sick or in some cases I went into work.

Q But, the only place then you would have had in 1983 observed them other than in your own home or at the Veterans Hospital would have been in Meriden, Connecticut at the Junior High School?

A I'm sure I believe that was the place.

The Court: Was that the place before he was teaching there?

The Witness: No, I don't teach there.

By Mr. Flynn:

Q Do other members of the church congregate, also, or did they in 1983 at the Meriden Junior High School?

A Some did, some went elsewhere.

(p. 1-24) Q On each occasion when you were at the Meriden Junior High School, were there other persons there?

A Yes, sir.

Q Was there any person in charge of the observance of the religious holy days when they were taken under observance at the High School or Junior High School in Meriden?

A There would be a minister that would be in charge.

Q Who was he?

A It may have been Mr. Wooldridge.

Q Do you remember who it was?

A We are talking about 19 —

Q Nineteen eighty-three.

A No; 1983 I walked out and went to work, and my wife and children remained, I'm sorry.

Q So then, you did not attend any services in 1983 at the Junior High School?

A Not at the high school, no, I didn't.

Q The exhibits that Mr. Rosen asked you about, Exhibits 12 and 13—

Mr. Flynn: Might I have those, your Honor?

The Court: Sure.

By Mr. Flynn:

Q Showing you first, Mr. Philbrook, Exhibit 12, God's Sacred Calendar, can you tell us where you got that (p. 1-25) publication?

A It was a long time ago, but I think it came out of Ambassador College in Pasadena.

Q Is this college associated with your religion?

A Yes, sir.

Q With respect to Exhibit 13, do you know where it came from?

A It would be the same place, sir.

Q Are you sure of that?

A They have publishing houses and so forth there, but I know they all come from the Worldwide Church of God based in Pasadena.

Q My question, I guess, is where did you get your copies? Do you know for sure that you sent to Ambassador College for them?

A Yes, sir; Ambassador College—at that time Radio Church of God.

Q Was that a prior name of this church when you speak of Radio Church of God?

A Yes, sir.

Q Is there a particular portion of either one of these exhibits which you say prevents you from working on these days?

A In its teachings and writings, yes, sir, it would be.

(p. 1-26) Q Are you able to tell us quickly where that is by reference to either one of these exhibits, either as to page or paragraph?

A I wouldn't be able to tell that only except to have the Scriptures themselves.

Q When you say that then, Mr. Philbrook, is there some Scripture reference that you have that requires this?

A Yes, sir.

Q What is that?

A It explains that I believe in Deuteronomy, approximately the 16th chapter; Leviticus, approximately the 16th chapter, the 23rd, 24th, and 25th chapters.

Q Is there anymore?

A I don't remember if I mentioned Exodus, the 12th chapter, 16th chapter. Then, going into the New Testament, Apollo on through those particular Scriptures and the spiritual significance, three of the Gospels, at least Matthew, Luke, John.

Q Those are the particular portions of those Gospels that you are talking about because they are quite lengthy, aren't they?

A They are, sir, and I would have to go back to them to refer to some of them.

The Court: May I interrupt and ask you whether in the Old or New Testament are you saying there (p. 1-27) are prohibitions to the members of working servile anywhere?

The Witness: Yes, sir.

The Court: Thank you.

By Mr. Flynn:

Q Are these days mentioned in the Scripture passages that you refer to?

A The occasion of holy convocation is mentioned.

The Court: My question is also as Mr. Flynn's is, I asked whether there was specific prohibitions in these various passages that prohibits you in your religion from doing any servile work? If I looked at all of them, would I find some?

The Witness: Yes, sir.

The Court: Do they mention them by days of the week or month or year?

The Witness: They mention them more by seasons, sir, based on the Hebrew calendar.

The Court: Would it be hard to determine what day during the season you would take as a holiday?

THE WITNESS: No, sir, because they tie it in with the Hebrew calendar, which part of it is outlined in this particular book.

The Court: Then, there is a date then by referring to the Hebrew calendar?

The Witness: There is, sir.

(p. 1-28) The Court: A day when you are not supposed to do servile work?

The Witness: Yes, sir.

The Court: Thank you. Is there some kind of concordance between the Hebrew calendar and our calendar so you can get the right days?

The Witness: Yes, sir.

The Court: Thank you.

By Mr. Flynn:

Q Do you specifically make any reference to the Hebrew calendar to determine that right day?

A I don't have to, because we are told at the church services when they are coming up anyway. I can, of course, —

Q Who would tell you at the services?

A It could be on a bulletin board or it could be a sermon speaker or sermon speakers.

Q Would these services that you are talking about occur on a Saturday?

A They occur on the Sabbath; a Saturday or sometimes during the Bible Study.

Q I see, and where are these held; also at the High School in Meriden?

A Some of them, it depends where it is. It might have a special social that might follow. It could be in one (p. 1-29) of the other school areas. It could be in a —

Q Have there been other places other than that high school in the year 1983 that you attended and where these admonitions to observe certain holidays were given and refrained from gainful work?

A There have been, sir.

Q What other places were involved?

A Well, I have attended up in Maine quite often during the summer vacation. I have visited in New York State and attended there, but we have been taught those. We know when they are coming basically by a calendar that can be issued to the membership.

Q In the year 1983, when did you get the calendar for those days which you would be required to refrain from any gainful work?

A You can right at the church headquarters.

Q I'm asking you when you got yours?

A I didn't get one, sir.

Q Then, when did you find out what days you would have to observe in the year 1983?

A I had found them out through church services.

Q What particular services in 1983 did you find that out, what month did it occur, and where was it?

A If it was a Passover service, it would be during that particular time, let's say, in March or April when (p. 1-30) that would come up. It depends on the season.

Q I'm asking you what dates it was that you found out you had to abstain from work on certain weekdays?

A I wouldn't remember these exact dates.

Q Do you remember who would have told you or who would have posted it?

A I wouldn't have any knowledge who would post it at times.

Q Did you see it in Meriden at references there when attending services at the Junior High School?

A I really do not remember. I've seen it in so many places.

Q With respect to your situation since the school year 1976-77, — I am talking now of the school year that would have commenced in September of '76 and gone through to the end of school in '77, — is it your testimony that that year you stopped taking additional days beyond the three permitted to you with pay in the contract?

A I did not attend Sabbath services on those holy convocations over and beyond those three.

Q I see, and it's your testimony that you followed the same procedure in 1978-79 school year and the ensuing school years up until the present time?

A I believe I have, sir.

Q Well, is that your testimony?

(p. 1-31) A Yes, sir.

Q You mentioned scheduling visits to the Veterans Hospital on some of these occasions?

A On some.

Q What was the purpose of that?

A I am being treated as an out patient at the Veterans Hospital, and there are certain times when my appointments would meet in clinician. That only meets in clinician on certain days. If they felt during a time when a holy day service was to be held and it conflicted with the school schedule, I would compromise for that reason.

The Court: Compromise by without observing?

The Witness: I would not attend the church service, but at the same time, I did not have to do the servile work that was for my occupation.

By Mr. Flynn:

Q Did you schedule these appointments in order to take advantage of some other part of the contract which would give you a day's pay for illness?

A I scheduled them in order to fulfill my obligation medically. I still couldn't fulfill my obligations as far as the church service was concerned.

Q Is there any particular reason why some of these medical appointments were scheduled on the same days as these holy days?

(p. 1-32) Mr. Rosen: Objection, asked and answered.

The Court: He might give another reason.

You may tell us if you can.

The Witness: Will you repeat the question?

Mr. Flynn: I'll ask the reporter —

The Court: No, you do it counsel; it's quicker.

By Mr. Flynn:

Q Was there any particular reason why you scheduled these days for V.A. visits at the Veterans Hospital on holy days?

A None other than what I have previously stated.

The Court: Are you finished counsel?

Mr. Flynn: No, your Honor.

The Court: I didn't realize you were sitting down. It makes me think of a Congressional investigation when everybody is sitting; no one stops talking. If you stand, you have to stop once in awhile, so stand.

Mr. Flynn: Your Honor, then, let me stand.

The Court: I don't mind you sitting down to consult, but questioning from the chair is not the way lawyers do it, as you know.

By Mr. Flynn:

Q Mr. Philbrook, with respect to your situation since you — running back until 1983, let's say until 1974, (p. 1-33) on those occasions where you took more days for religious observances than were permitted by the Collective Labor Contract governing the teachers in Ansonia, were you threatened with any reprisals or dismissals?

A No, sir.

Q With respect to the year of 1976, — I'm talking now about the calendar year — can you tell us about how much money you lost in pay by the inability to take additional days with pay to observe your religious holy days?

A I don't remember without looking at the documents, sir.

Q You have documents that would refresh your recollection?

A Not personally I don't.

Q Would you know approximately what percentage that amount was of your entire annual salary?

A One one hundredth of my salary comes to mind, but I'm not exactly sure if that's changed.

Q Mr. Philbrook, in 1976, were there any days that you had taken as holy days that you were not paid for?

A I don't remember, sir.

Q In 1975, were there any days that you had taken as holy days that you were not paid for?

A I don't remember the last year. It was somewhere (p. 1-34) around 1975, but I just don't remember for sure.

Q In the year 1974 — and I speak of the calendar year — were there any days that you had to take as religious holy days that your employer did not pay you for that occurred on school days?

A I'm not sure. I believe there must have been.

Q You are not sure?

A It would all be in the record.

Q Mr. Philbrook, would you know whether or not the loss in any year you are talking about would have to exceed more than the percent of your annual salary?

A No, sir, I couldn't tell you that.

Q But, your claim is that whatever you lost placed an undue burden on you in the practice of your religion?

A Yes, sir.

Mr. Flynn: I have nothing further at this time, your Honor.

CROSS EXAMINATION

By Mr. Sullivan:

Q Mr. Philbrook, I would like to show you Defendants' Exhibit B, and this is a letter signed by James R. Rosenthal, is that a name you recognize?

A Yes, sir.

Q Is this a letter you solicited from the Worldwide Church of God in or on behalf of your Complaint filed with (p. 1-35) the Commission on Human Rights and Opportunities?

A I don't know whether I solicited it or not, sir.

Q Do you recall whether or not that's something you provided to the Commission?

A I don't remember whether I provided it or somebody from the Commission asked.

Q Now, this letter states, Mr. Philbrook, that possible sanctions against a member of the Worldwide Church of God for not observing religious holy days is loss of eternal life, that that is a —

The Court: Life?

By Mr. Sullivan:

Q — eternal life as a member of the Worldwide Church of God; do you agree with that statement?

A Repeat the question, please.

Q The letter states — perhaps you would like to quickly look it over.

(Pause.)

By Mr. Sullivan:

Q Have you read the letter, Mr. Philbrook?

A Yes, sir.

Q The letter states — and this is the letter of Mr. Rosenthal, a minister of the Worldwide Church of God — and I quote, "We stress the keeping of these annual and weekly days in the firm belief that their observance is (p. 1-36) required as a precondition to the receiving of the gift of eternal life"?

A Yes, sir.

Q Now, do you agree with that statement as a member of the church?

A Yes, sir.

Mr. Sullivan: I have no further questions, your Honor.

REDIRECT EXAMINATION

By Mr. Rosen:

Q Mr. Philbrook, you were asked by Attorney Flynn about the amount of absences, if any, because of observance of holy days. Did you make a record of when you were absent for observance of holy days?

A Yes, sir.

Q When you marked on school records that you were absent because of religious holy days, was that invariably accurate?

A Yes, it was, sir.

Mr. Rosen: Thank you. No further questions.

The Court: You may step down, sir.

(Witness excused.)

The Court: We have to confer about your case for the Plaintiff.

Mr. Rosen: One more witness, your Honor; the (p. 1-37) investigator from the Commission on Human Rights and Opportunities who I expect to have on direct for approximately five to ten minutes. Shall we do that and then we can eat?

Mr. Julianelle, please.

BRUCE E. JULIANELLE, called as a witness by the Plaintiff, being first duly sworn by the Clerk, was examined, and testified on his oath as follows:

The Clerk: Please be seated. Would you state your name and spell your last name for the record.

The Witness: Bruce Julianelle, J-u-l-i-a-n-e-l-l-e.

The Court: Do it, again, for me.

The Witness: J-u-l-i-a-n-e-l-l-e.

The Court: Thank you.

The Clerk: Your home address, please.

The Witness: One sixteen Cherry Lane, West Haven.

DIRECT EXAMINATION

(p. 1-38) By Mr. Rosen:

Q Mr. Julianelle, by whom are you employed?

A Connecticut State Commission on Human Rights and Opportunities.

Q Your job is what, sir?

A Presently Regional Supervisor.

Q In the period 1974 to 1976, your job was what?

A Representative.

Q Were you the representative involved in this case?

A Yes.

Q Can you tell the Court briefly, sir, what efforts — withdrawn.

On behalf of your agency, did you make a preliminary determination with respect to this case when it came to your attention?

A Yes.

Q What was that preliminary determination?

A That there was reasonable cause to believe that an unfair employment practice was committed.

Q Based on that preliminary determination, what efforts did you then make?

A We endeavored to conciliate with both respondents, and we made a proposal via a conciliation agreement, and our endeavors to conciliate were, as you know, unsuccessful.

Q In addition to the proposal that you made — (p. 1-39) withdrawn.

Is that proposal part of the file which has been marked as Exhibit 16?

A Yes, it is.

Q And in addition to that proposal, did you explore other possible conciliations?

A I believe the conciliation agreement contained a proposal that would have reconciled the problem.

Q Were you able to effect a conciliation?

A No.

Q Why not?

A Because the respondent was not amenable to our proposal.

Q Respondent meaning who?

A Both the Board and the Union, primarily —

Mr. Rosen: No further questions.

The Court: Primarily?

The Witness: I was going to say primarily the Board.

Mr. Rosen: No further questions.

The Court: Any cross?

CROSS EXAMINATION

By Mr. Flynn:

Q Mr. Julianelle, do you remember having a discussion in 1974 with Katherine Roberts?

(p. 1-40) A Yes.

Q Do you see Mrs. Roberts here today?

A Yes.

Q And whether or not you can tell me and the Court whether she was an officer of the Union at that point?

A Yes, she was.

Q Is that the reason you had a discussion with her?

A Yes.

Q And isn't it true that she did agree to conciliate in this matter?

A I don't recall that.

Q You don't remember?

A I don't recall that, in fact, I think if there was a problem that the Union could not unilaterally conciliate the matter because there was a Collective Bargaining Agreement involved.

Q But, my question is, she as far as the Union was concerned on its side of the equation indicated a willingness to conciliate this matter?

A I think at this point there was some support in our proposal.

Q May I see your file which you brought?
(Handing.)

By Mr. Flynn:

Q Can you tell me where in this file the issue (p. 1-41) broke down as to where the Board of Education stood with respect to your proposed conciliation agreement?

A I have before me a conciliation agreement and both the Ansonia Board of Education and the Federation of Teachers are cited as respondents, Mr. Philbrook as complainant. In this document, there is a proposal.

The Court: He wants to know where it broke down, isn't that the question?

Mr. Flynn: That's the question.

A At this point in time, let me see, — you want a date?

Q Yes, and I want to know if you have any documents to indicate how it broke down.

A Excuse me for a second. It broke down in April of '74, April or May of '74; I don't have a specific date.

Q What events happened in April of 1974 to cause this to breakdown?

A We formally endeavored to conciliate with both respondents. There was an objection to the proposed terms of the conciliation.

Q By whom?

A By the Board of Education.

Q Where is that reflected in your file? Was there a letter to that effect?

A I can't put my finger on it right now. There was (p. 1-42) correspondence from Attorney Lyons who was representing the Board. There was a letter dated May of '75 from Commission counsel to James Lyons, attorney for the Board, and I think subsequent to this letter, it broke down permanently. This was another effort to resolve the matter with the Board of Education.

Q So, you weren't able to make any progress then with the Board of Education?

A No.

Q And that's where it broke down?

A Yes.

Q Isn't it true subsequently to that you determined you had no jurisdiction in this case anyway because the statute did not permit you to undertake cognizance of allegations of religious discrimination?

A That's true.

Mr. Flynn: I don't have anything further.

CROSS EXAMINATION

By Mr. Sullivan:

Q Mr. Julianelle, you've indicated that the Commission determined that it had no jurisdiction in this matter, is that correct?

A Yes, pursuant to the Connecticut Supreme Court's decision in *Corey versus Avco*, A-v-c-o.

Mr. Sullivan: Your Honor, based on that (p. 1-43) testimony, I move this witness's testimony be stricken. I don't see the competency of this witness to testify with regard to any of the issues in this case in view of the fact that the Commission for which he works has no jurisdiction over a claim of religious discrimination.

The Witness: Could I answer that?

The Court: No.

Mr. Rosen: Your Honor, in the first place, this agency was operating for what's called a deferral agency for the Federal Equal Opportunity Employment Commission.

The Court: If counsel is correct that they had no jurisdiction whether or not they decided to try to do something or not is sort of wasted time.

Mr. Rosen: The relevance, your Honor, is that the Defendant School Board here was offered with specific proposals, was offered to have an accommodation which it refused to take. The fact that it was made an official agency seems to me almost guilting the lily.

The Court: If the Supreme Court of Connecticut says they shouldn't get in this business at all because they weren't allowed to doesn't —

Mr. Rosen: The point is, however, that the Board refused to modify its position.

The Court: That might be a fact, but if the (p. 1-44) Board of Human Rights — whatever the title is — accord-

ing to the highest court in Connecticut had no business getting involved, then we are out of business altogether, aren't we, as far as this witness and whatever he says?

Mr. Rosen: No. Well, —

The Court: You say it has some relevancy?

Mr. Rosen: Yes.

The Court: Maybe it has some relevancy. Can the witness step down now? Are you finished?

Mr. Sullivan: Will there be a ruling on my objection?

The Court: I'll reserve.

Mr. Rosen: I have brief redirect.

REDIRECT EXAMINATION

By Mr. Rosen:

Q Mr. Julianelle, why don't you tell the Court what was the basis for you taking any effort if, in fact, the Connecticut Supreme Court held that you should not be covering religious discrimination?

A *Corey versus Avco* decision —

The Court: Please. The Court is not interested in the legal —

A They did not preclude the Commission from investigating or stating — we did not have jurisdiction in religious cases — they said we could not enforce the (p. 1-45) reasonable accommodation principal in religious cases.

By Mr. Rosen:

Q Did the Ansonia Board of Education as far as you know indicate to you or to anybody that it was willing to make any accommodation other than what it had already made to Mr. Philbrook's religious convocations?

A They never made any formal proposal to resolve the matter with the Commission on Human Rights.

Q The risk that it may have without saying, what is Exhibit 16?

A It's a case file on the Philbrook case, the entire case file.

Q Of your agency?

A Right.

Q Does it contain in it as well some documents from the Equal Opportunity Commission?

A Yes, it does.

Mr. Rosen: No further questions.

The Court: That's all? Thank you, sir.

(Witness excused.)

Mr. Rosen: Your Honor, Plaintiff rests.

* * *

(p. 1-47) ROBERT ZURAW,
called by the Defendant Board of Education, being
first duly sworn by the Clerk, was examined and tes-
tified on his oath as follows:

The Clerk: Please be seated. Would you state your
name and spell your last name for the record.

The Witness: Robert Zuraw, Z-u-r-a-w.

The Clerk: Your home address?

The Witness: Twenty-five High Acres Road, An-
sonia.

DIRECT EXAMINATION

By Mr. Sullivan:

Q Mr. Zuraw, you are an employee of the Ansonia
Board of Education, are you not?

A Yes, I am.

Q What position do you hold in the School System?

(p. 1-48) A Superintendent of Schools.

Q As Superintendent of Schools, do you have any
responsibility with regard to the monitoring of the Col-
lective Bargaining Agreement covering teachers?

A Yes, I do, sir.

Q What responsibilities would you have specifically
with regard to the use of personal leave days by teachers?

A Right now I am the one who will approve the use
of personal days.

Q So, if I understand your testimony, there is some
process for monitoring the use of those days under the
contract?

A Yes, there is.

Q Would you describe for the Court what that pro-
cess is?

A According to the contract, people do have three personal days; one at their discretion where they must notify the Principal or their superior 48 hours prior to taking the day using the form we have developed, the other two days 48 hours notice to me, and I give it to them. They take it with prior approval. There is a card where the teacher notes the date she wants and the purpose or reason for taking the day off. These cards —

Q Excuse me, I just want to show you Defendants' Exhibits A and ask you whether or not these are (p. 1-49) representative of the cards that teachers fill out?

A Yes, this is not the one requesting a personal day. This is a record of attendance.

M. Flynn: Could the witness raise his voice?

The Court: Yes.

A It's a record of attendance. They are the yellow cards.

BY MR. SULLIVAN:

Q Are those the yellow cards?

A These are the yellow cards. The cards I'm talking about are the white cards.

Q So, a teacher fills out a card?

The Court: What you showed the witness was "A" to "D", and they are not the cards?

Mr. Sullivan: Those are not the white cards to which the witness testified, your Honor.

The Court: Very good.

BY MR. SULLIVAN:

Q Mr. Zuraw, what happens to a white card when the witness fills that out — rather when a teacher fills that out?

A What will happen is that if it's the one day that is discretionary, they will give it to the Principal, and the Principal will approve it. If it's a day I must approve, it comes through interdepartment mail to our office. I (p. 1-50) review it, and then notify the girl to contact the professional staff member and tell them we are approving it or we are not going to approve the date. The other case would be to approve it without pay.

Q Now, the Collective Bargaining Agreement covering teachers which is Plaintiff's Exhibit 11 indicates that the three days about which you are speaking are used for necessary personal business?

A Yes.

Q How do you determine in a given case what constitutes necessary personal business?

A Well, it would be business that is not listed in the contract. There are several items listed in the contract that would be personal business — which is not listed in the contract — which the professional staff member must do and the only time available to do it is during a school day.

Q Now, what do you do, if anything, Mr. Zuraw, if it's determined that a teacher utilized a personal day for something which in your judgment would not constitute necessary personal business?

A With the notification, what we would do is notify that person, that I do not consider it to be a necessary personal legitimate day I guess you might say, and the use of this day with pay is denied, and if they take it, they (p. 1-51) will be docked a day's pay.

Q Mr. Zuraw, we have had testimony — and, of course, Plaintiff's Exhibit 11 indicates — also that the contract provides three days per teacher for religious observance?

A Yes.

Q We have also had testimony from the Plaintiff in this case, Mr. Philbrook, that in a given year, he may be required to utilize more than three days for mandatory religious observance?

A That is correct.

Q What steps, if any, has the Ansonia Board of Education taken to accommodate Mr. Philbrook in his need with regard to religious observance beyond the three days allowed in the contract?

A We have allowed him to take those days without pay.

Q Now, have there been any other teachers to your knowledge in the Ansonia School System who have had a problem similar to Mr. Philbrook's with regard to religious observance?

A Yes, there is one other teacher who is now retired.

Q Do you recall the name of that teacher?

A Mrs. Mildred Webber.

(p. 1-52) Q Do you recall what religious faith she belonged to?

A The Jewish faith, I guess you would call Orthodox Jewish faith.

Q What was Mrs. Webber's particular problem with regard to religious observance?

A Well, she also celebrated more than three days. She celebrated in some cases five days, six days and was then docked those days in excess of three.

Q She was allowed to take the days beyond three off without pay?

A Right.

Q Mr. Zuraw, as Superintendent of Schools, are you familiar with the administrative steps that are taken in covering a teacher's class when the teacher is not present?

A Yes.

Q Would you describe for the Court what happens, for example, in the case of Mr. Philbrook when he is absent for reasons of religious observance dates?

A When the teacher is absent, he or she will call the answering service. We have an arrangement with an answering service which then contacts people that we have on our substitute list to substitute for that day. What we'll have is we have people who are certified teachers, some who are college graduates that we have had certified. (p. 1-53) We also have been able to certify some people with two years or more or even less than two

years of college. By sending information to the State Department of Education, we can get temporary certification for them as substitutes.

Q Now, in the case of a business teacher like Mr. Philbrook, is there any difficulty in getting another business teacher as a substitute to take his classes?

A Yes, there is, in fact, there is difficulty getting any substitutes. We have had a very difficult time in the last three or four years covering our classes with substitute teachers.

Q And, again, in the case of Mr. Philbrook, have you been able to on any occasion that you can remember get a substitute teacher who was able to teach business or was certified as a teacher in that area?

A Thinking back, we probably have had very few. I would guess the majority of them are not certified in business.

Q As Superintendent of Schools, do you have an opinion regarding the quality of teaching in a business class when you do not have a substitute who is a business teacher?

Mr. Rosen: I object unless it's tied into his experience or observation.

The Court: Well, I assume that's what it all (p. 1-54) is.

Do you have any experience or observation to answer the question?

The Witness: I do know what happens in most classes when we do not have qualified people substituting. I've known it as having experience as a Principal.

BY MR. SULLIVAN:

Q Prior to becoming Superintendent, you were Principal?

A Right.

Q And as Principal, you've had experience in dealing with whatever problems arose when substitutes take over the classes of regular teachers?

A Yes.

Q So you understand what problems occur?

A Yes.

Q Would you describe for the Court precisely what kinds of problems occur in the case of filling Mr. Philbrook's classroom with a substitute teacher?

A Well, most cases and I will say in almost all cases, it is very difficult to get any teaching done or more importantly learning done particularly at the high school level. Discipline can be difficult. Teaching subjects such as typing or bookkeeping, that can be very difficult for a person who does not have any experience and (p. 1-55) adds problems with the Business Department, particularly that type of department because of the fact that we have probably thirty, forty thousand dollars worth of very valuable equipment there in typewriters and what not, and we do have the problem of damage when we have

teachers who are not the regular classroom teachers. When we have substitutes, we have a great deal of damage and quite a bit of fooling around, I guess you could call it. It's not a very sound educational setting.

The Court: Not attributable to the man or woman but to the students?

The Witness: To both, in other words, it's a very difficult thing to do, and you have children at that level knowing you have a substitute it becomes very difficult to accomplish very much.

The Court: My question was addressed to the damage. Damage would be done by the pupil?

The Witness: Yes, because there is lack of supervision.

BY MR. SULLIVAN:

Q And the lack of supervision in your judgment would be caused by what?

A It's caused by having in that classroom a person who is not adequately prepared and cannot cope with the situation.

(p 1-56) Q You've indicated on occasion that apart from getting a qualified substitute, for example, in the area of business, you've, indeed, had difficulty getting anybody to fill certain classrooms, is that a fair summary of your testimony?

A Yes, it is. In particular, in the high school we have a great deal of difficulty getting substitutes at the high school level.

Q Mr. Philbrook is teaching at the high school level?

A Yes. We do manage to get substitutes in the primary level grades, intermediate. When we get to the upper elementary, 7th and 8th and high school, it's very difficult, in fact, a situation exists many a day in the high school where we may have three or four classes not covered. We have someone covering three or four classes sitting in the cafeteria, it ends up being a study period, and we have probably 60, 70 children sitting in a cafeteria with one person supervising the study or whatever you want to call it. It's very difficult to get substitutes.

Q Does instruction take place when the kids are in the cafeteria?

A No.

Q Has there been occasion when the high school could get a person who substituted for Mr. Philbrook when (p. 1-57) he's been absent?

A That I couldn't answer. I know there are substitutes. Where they put the substitutes, I don't know. In many cases we have had six or seven people absent at the high school level, and we have had two or three subjects that were actually short, and by the administrator moving people, they could cover some of the classes. I'm not sure if it's his class they covered or ones they don't. It's difficult to answer.

Q Mr. Zuraw, with regard to the three days covered in the Collective Bargaining Agreement for religious observance, can you tell me last year in the 82-83 school year how many teachers utilized all of their allotted leave for that purpose?

A There was only one. Eight teachers used religious days but only one used all three, and that one teacher was Mr. Philbrook.

Q With regard to the three days allotted in the contract for necessary personal business, can you tell the Court how many teachers last year utilized those three days, all of those three days?

A We had two teachers use all three days.

Q How many teachers do you have in the School System, Mr. Zuraw?

A We run around 150.

. . .

(p. 1-62)

[CROSS-EXAMINATION OF ROBERT ZURAW BY MR. ROSEN]

Q Now, the personal business leave provision of the contract allows a teacher three days per year, is that right?

A That is correct.

Q You were explaining to your counsel the review and approval procedure for use of these three days, is that right?

A Yes.

Q Did I understand you that you review a card completed by the staff member?

A Yes.

Q And based on the information on the card, you either approve or disapprove?

A Yes.

Q What does the teacher need to disclose in order (p. 1-63) to gain approval for use of a personal business day?

A Well, it can be stated in rather general terms. Education is something like legal business, legal family business, I mean, it doesn't mention whether it's a divorce hearing or what not. It says legal family business.

Q In fact, it's sufficient for the staff member simply to say "personal business"?

A No, it is not.

Q Have you approved —

A I'm sorry, that is the first. I recall there are three days; one day where it is at their discretion, the other two days with my prior approval.

Q Is your approval noted in the box where it says "Approved", "Not Approved"?

A Yes. These people you have are aids, and they have a different contract. They are not teachers. Certain contracts do not read — it says just personal business, and they have it. It depends on what union you belong to and what contract you have. They have different provisions.

Q Is this individual whose card I'm showing you an aid or school teacher?

A That is a teacher.

Q Did you approve that person's personal business leave?

A Yes, that's the one day and we make note of that (p. 1-64) one day without a reason.

• • •

(p. 1-67) [CROSS-EXAMINATION OF ROBERT ZURAW BY MR. FLYNN]

Q In the time that you have been Superintendent of Schools, have you paid any other teacher beyond three days for religious holy days?

A I have not, in fact, the only other person I mentioned was Mrs. Webber who retired, I think, a year or so prior to my taking over as Superintendent.

Q So, your testimony then is that Mr. Philbrook who is the Plaintiff in this case in that regard then is not treated any differently than any of the other employees?

A He is not treated any differently.

Q Other than the docking of Mr. Philbrook's pay, have you made any threats or in any way tried to intimidate him over those?

A No, I have not.

Q Is your answer "no"?

A No, I have not.

The Court: Plaintiff hasn't testified to anything about that.

By Mr. Flynn:

Q Mr. Zuraw, how many days out of the three hundred and sixty-five do teachers in the Ansonia School System work? How many days are they required to work?

A We have one hundred eighty days in the school year, and they may be called in two days prior to the start (p. 1-68) of the school for workshops.

Q So then, the maximum number of days they would be required to work is one hundred eighty-two?

A That is correct.

Q Mr. Zuraw, with respect to other provisions of the contract, for example, with respect to the provisions of the contract which relate to funerals, suppose some teacher's spouse dies, do you know how many days are permitted of leave for that teacher after that?

A I believe it's five days, yes, five.

The Court: In the contract?

The Witness: By the contract, yes, each time.

By Mr. Flynn:

Q If a teacher hasn't used his or her three personal days, are they permitted to tack on those personal days to the five days that they have for the funeral?

A No, they are not.

Mr. Flynn: I have nothing further, your Honor.

The Court: That's it, gentlemen?

Mr. Sullivan: Just briefly, your Honor.

REDIRECT EXAMINATION

By Mr. Sullivan:

Q Mr. Zuraw, you indicated if I understand your testimony in response to Mr. Flynn's question, the three (p. 1-69) days in the contract allotted for necessary personal business may not be used for one of the specific reasons stated in the contract, for example, funeral leave, is that your testimony?

A It's in the contract that way, yes.

Q You testified in response to a question from Mr. Rosen that one of the three days for necessary personal business for one of these days the teachers need not have a reason for taking that day, is that correct?

A That is correct.

Q May one of these days be used by a teacher for one of the reasons specifically listed in the contract?

A No, it cannot be used for one of those reasons.

Q So, even now a teacher need not state the reason, it can't be any reason of necessary personal business that teacher might have, is that a fair statement?

A Yes, it cannot be any of these that are listed in the contract, same limitation applies to that day.

Q What steps, if any, have you taken as Superintendent of Schools to insure that teachers do not use that one day for which no reason may be stated for a specific reason listed in the contract?

A I have contacted certain people who on occasion I suspected that happened,—the day might have been used

for one of those that it is not specifically listed—I (p. 1-70) have contacted the people, I have sent them letters, I had brought them in, I had discussions with them. The question that I cannot ask them is what the day is, but I can tell them it cannot be one of the six that are stated in the contract.

Q If, in fact, you find that a teacher has utilized that one day for one of the reasons specifically listed in the contract for which days are separately allotted, what action, if any, would you take?

A If I found out, they would be deducted a day's salary for that one day.

Mr. Sullivan: Thank you. No further questions.

RECROSS EXAMINATION

By Mr. Rosen:

Q Mr. Zuraw, do you know what measures, if any, were taken prior to your becoming Superintendent—

The Court: This doesn't sound like recross examination. Is it?

Mr. Rosen: Yes. I thought I was following up one of the questions—

The Court: Really, then, I missed it. Go ahead.

By Mr. Rosen:

Q What steps were taken prior to your becoming (p. 1-71) Superintendent as to any of the supervision that you just testified to of personal leave?

A I couldn't answer—it's probably the same thing, I don't know.

* * *

(p. 1-99) [DIRECT EXAMINATION OF DENNIS GLEASON BY MR. FLYNN]

Q And whether or not you have any personal knowledge as to whether any proposals were made by the Ansonia Federation of Teachers to the Ansonia Board of Education to give them additional days?

A There have been proposals made.

Q How many do you specifically recall?

A I can specifically recall at least—at least two.

Q What did you propose to the Board of Education?

A The major thrust of our proposal was simply to allow the expansion of the three days allowed to a total by (p. 1-100) incorporating the three personal leave days.

Q Did the Board of Education at any point in time agree to this?

A They did not.

Q And whether or not you can tell us whether you have any knowledge that under the way the contractual provisions have been implemented whether anyone else has gotten paid for more than three religious days from 1974 on?

A To the best of my knowledge, this has not happened.

* * *

(p. 2-9) RONALD PHILBROOK,

recalled as a witness by the Plaintiff, resumed the witness stand, testifying further on his oath as follows:

DIRECT EXAMINATION

By Mr. Rosen:

Q Mr. Philbrook, are there procedures that you follow to minimize the problems of your absence and the problems of having a substitute replace you?

* * *

(p. 2-11) Q Tell me, for how long have you been using the procedure that you now use?

A The procedure we now use—

The Court: Not we, you I think.

A (Continuing) The procedure I use now with the answering service, I don't remember when that came into existence.

By Mr. Rosen:

Q Has it been some number of years?

A Yes, sir.

Q Can you tell me what procedure, if there is any, that you have been following consistently for the last several years?

A Ever since I have been into teaching, my procedure is that I teach a skilled area; typewriters, machinery or whatever. It is a production-type course so there-

fore, I usually use a procedure with my students that their material was given to them throughout folders or on (p. 2-12) the bulletin boards or on the blackboard.

I also have a procedure that if anybody substitutes for me, that they leave me a message containing how the class was conducted and also, the attendance record of each class.

Q All right. Is it possible for you to determine with that procedure whether any learning has gone on in your absence?

A Yes. It is.

Q Have you observed over the years whether or not learning does occur and has occurred during the days that you are absent?

A Yes, because it would be in a skill area. It is an ongoing production.

Q Has significant learning occurred during the days that you have been absent?

A Yes.

Q Do these procedures that you have permit you to know whether or not the students have been taken out of the classrooms and put into the cafeteria or other setting that was discussed yesterday?

A I can know that for a fact, yes, sir.

Q Has that ever happened?

A Never to my knowledge.

Q Well, the question, would you know?

(p. 2-13) A Never as a fact. It has never happened in my class.

Q That's something that you have that your procedures do permit you to know?

A I know that, yes.

Mr. Rosen: That's all.

The Court: Any cross?

CROSS EXAMINATION

By Mr. Flynn:

Q What procedures do you have that permit you to know where your students are in the school when you are not there?

A My procedure has always been —

The Court: He wants to know what procedure you have that gives you the knowledge as to what the students did or didn't do in your absence. Wasn't that the question?

By Mr. Flynn:

Q That's it exactly.

A The lesson plans and the notes from the substitutes.

The Court: The plans wouldn't tell you what happened in your absence, would they?

(p. 2-14) The Witness: Yes, sir. They would.

The Court: They would?

The Witness: Yes, sir.

The Court: That's better than the plans of mine. That's better than the best laid plans of mice and men. Do you remember?

The Witness: Yes. I do.

The Court: But anyway, you know it?

The Witness: I know it, sir, from the skilled area. It is an ongoing production, right, what I teach.

By Mr. Flynn:

Q Who prepares the plans?

A I do.

Q Then how do you know from the plans that were prepared prior to your absence what happened at the time of your absence by looking at them after your absence?

A Because of the productions papers and work that comes into me completed that had to be done during my absence.

The Court: Then it would be known from something that resulted afterwards?

The Witness: Yes.

The Court: The results?

The Witness: I can know it from results, right.

(p. 2-15) Mr. Flynn: I have nothing further.

The Court: Counsel?

Mr. Sullivan: No questions, your Honor.

(Witness excused.)

* * *

PLAINTIFF'S EXHIBIT 1 (EXCERPTS)
FILED IN THE DISTRICT COURT ON
DECEMBER 12, 1983

AGREEMENT

between the
ANSONIA BOARD OF EDUCATION
and the
ANSONIA EDUCATION ASSOCIATION
affiliated with the
CONNECTICUT EDUCATION ASSOCIATION
and the
NATIONAL EDUCATION ASSOCIATION

covering the period
May 3, 1966 to May 2, 1967

* * *

ARTICLE IX

SICK LEAVE

A. All certificated professional employees shall be granted annually fifteen days of sick leave with full pay. Beginning with the school year 1966 the accumulation of unused sick leave shall be at least 90 days and may be increased at the discretion of the board.

B. For absence for sickness beyond granted leave, employees shall receive the difference between their substitute's pay and their regular salary.

C. In the event of absence of a teacher for illness in excess of five (5) consecutive working days, the Board may, if it has reasonable cause to believe that there is an abuse of sick leave policy, require an examination by an independent physician, such examination to be at the Board's expense.

ARTICLE X
LEAVES OF ABSENCE

A. Each member of the professional staff shall be entitled to five (5) days leaves of absence with full pay for personal and or legal reasons.

B. The board, at its discretion and in accordance with its long-standing practice, may grant additional paid leave to teachers who have exhausted their allowable accumulated leave under existing policies and in extra-ordinary circumstances.

C. Application for leave in the provisions of Section A and B above shall be made to the immediate supervisor at least twenty-four hours before taking such leave (except in the case of emergencies).

* * *

PLAINTIFF'S EXHIBIT 2 (EXCERPTS)
FILED IN THE DISTRICT COURT ON
DECEMBER 12, 1983

CONTRACT
between the
ANSONIA BOARD OF EDUCATION
AND THE
ANSONIA FEDERATION OF TEACHERS,
LOCAL 1012

For one Year
May 29, 1967 to June 30, 1968

* * *

ARTICLE V
LEAVE PROVISIONS

A. *Annual Leave*

Eighteen (18) days of annual leave, cumulative to a total of 150 days, shall be granted for personal illness, illness in the immediate family which requires the presence of the teacher, and/or for the reasons, and within the limits set forth below:

1. Compulsory court appearance as party
or witness no limit
2. Death in the immediate family ... 5 day limit
3. Funerals
 - a) family 1 day
 - b) friend, etc. 1 day per year
4. Weddings 1 day per year
5. Graduation, ordination, etc. 1 day
6. Official delegate to National
Veterans Organization 3 days per year

7. Personal reasons at Supt's
discretion

Absence for not more than three (3) days per year for observance of Religious Holy Days which church laws make obligatory shall not be charged to annual leave.

In all instances, reasons for absence shall be reported on appropriate forms. Except in emergencies, applications for leave shall be made at least three (3) days in advance. For all absences not authorized herein, as determined by the superintendent or his designated agent, from the information submitted, a salary deduction equal to 1/200 of annual salary shall be made.

In the event of absence for personal illness in excess of five (5) consecutive working days, the Board may require examination by an independent physician at the Board's expense.

• • •

PLAINTIFF'S EXHIBIT 3 (EXCERPTS)
FILED IN THE DISTRICT COURT ON
DECEMBER 12, 1983

AGREEMENT BETWEEN THE ANSONIA BOARD
OF EDUCATION AND THE ANSONIA
FEDERATION OF TEACHERS, LOCAL 1012,
FOR THE PERIOD FROM
JULY 1, 1968 THROUGH JUNE 30, 1969

* * *

ARTICLE V
LEAVE PROVISIONS

A *Annual Leave*

Eighteen (18) days of annual leave cumulative to 150 days shall be granted for personal illness, illness in the immediate family which requires the presence of the teacher, and/or for the reasons, and within the limits stated below:

1. Compulsory court appearance as party
or witness no limit
2. Death in the immediate family 5 day limit
3. Funerals
 - a) family 1 day
 - b) friend 1 day per year
4. Attendance at a wedding on a school day 1 day
5. Graduation, ordination, etc. 1 day
6. Official delegate to National Veterans Organization
3 days per year
7. Religious Holy Days which church laws make
obligatory 3 days per year

8. Legitimate and necessary personal business at the teacher's discretion (but not including marriage or travel for personal or family convenience)
3 days per year

For absences for personal illness in excess of accumulated leave, a salary deduction of twenty-five (25) dollars shall be made for each day. Proof of illness may be required by the Board at its discretion.

For absences other than for personal illness and not authorized herein, a salary deduction equal to 1/200th of the annual salary shall be made.

In all instances, reasons for absence shall be reported on appropriate forms. Except in emergencies, applications for leave shall be made at least three (3) days in advance.

* * *

PLAINTIFF'S EXHIBIT 4 (EXCERPTS)
FILED IN THE DISTRICT COURT ON
DECEMBER 12, 1983

CONTRACT
between the
ANSONIA BOARD OF EDUCATION
and the
ANSONIA FEDERATION OF TEACHERS
A.F.T. Local 1012
AFL—CIO

For One Year
JULY 1, 1969 to JUNE 30, 1970

* * *

ARTICLE V LEAVE PROVISIONS

A. *Annual Leave*

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness in the immediate family which requires the presence of the professional staff member, and/or for the reasons, and within the limits stated below:

1. Death in the immediate family 5 day limit each time
2. Funerals: family 1 day each time
friend 1 day per year
3. Attendance at a family wedding or participation in a wedding 1 day each time
4. Family graduation or religious ceremony 1 day each time
5. Official delegate to National Vet. Org. 3 days per year
6. Legitimate and necessary personal business at the teacher's discretion (but not including marriage, travel for personal or family convenience, or for 1 through 5 above) 3 days per year

The professional staff member shall make all reasonable efforts to plan and conduct such personal business so that it does not conflict with assigned professional duties.

Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law, shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for ab-

sence due to Religious Holidays in excess of 3 days per year.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

For absences for personal illness in excess of accumulated leave, a salary deduction of seventy-five per cent of 1/200 of the professional staff member's annual salary shall be made for each excess absent day.

Proof of illness may be required by the Board after four consecutive school days of illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal 1/200th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

* * *

PLAINTIFF'S EXHIBIT 5 (EXCERPTS)
FILED IN THE DISTRICT COURT ON
DECEMBER 12, 1983

CONTRACT
BETWEEN THE
Ansonia Board of Education
and the
Ansonia Federation of Teachers
A.F.T. Local 1012
AFL-CIO

For One Year
JULY 1, 1970 TO JUNE 30, 1971

* * *

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness in the immediate family which requires the presence of the professional staff member, and/or for the reasons, and within the limits stated below:

1. Death in the immediate family.....5 day limit each time
2. Funerals: Family1 day each time
Friend1 day per year
3. Attendance at a family wedding or participation in a wedding1 day each time
4. Family graduation or religious ceremony1 day each time
5. Official delegate to National Vet. Org.3 days per year

6. Legitimate and necessary personal business at the teacher's discretion, *subject to other provisions of this Article*3 days per year
Personal business shall not include (without limitation)

1. Any marriage attendance or participation.
2. Attendance at any sport or recreational event.
3. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal business.
4. Purposes set forth in 1 through 5 above.
5. Any religious activity.

The professional staff member shall make all reasonable efforts to plan and conduct such personal business so that it does not conflict with assigned professional duties. The professional staff member must inform the Superintendent in writing on the form developed by the Superintendent and approved by the Federation when annual leave has been taken.

Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or

is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

The Board may require satisfactory *proof of illness* after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to 1/200th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

* * *

PLAINTIFF'S EXHIBIT 6 (EXCERPTS)
FILED IN THE DISTRICT COURT
ON DECEMBER 12, 1983

CONTRACT
BETWEEN THE
Ansonia Board of Education
and the
Ansonia Federation of Teachers
A.F.T. Local 1012
AFL-CIO

For the Period
DECEMBER 11, 1971 TO JUNE 30, 1972

* * *

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness in the immediate family which requires the presence of the professional staff member, and/or for the reasons, and within the limits stated below:

1. Death in the immediate family.....5 day limit each time
2. Funerals: Family1 day each time
Friend1 day per year
3. Attendance at a family wedding or
participation in a wedding1 day each time
4. Family graduation or religious
ceremony1 day each time
5. Official delegate to National Vet.
Org.3 days per year

6. Legitimate and necessary personal business at the teachers' discretion, *subject to other provisions of this Article*3 days per year

Personal business shall not include (without limitation)

- a. Any marriage attendance or participation,
- b. Day following marriage or wedding trip,
- c. Attendance at any sport or recreational event,
- d. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal business,
- e. Purposes set forth in 1 through 5 above,
- f. Any religious activity.

The professional staff member shall make all reasonable efforts to plan and conduct such personal business so that it does not conflict with assigned professional duties. The professional staff member must inform the Superintendent in writing on the form developed by the Superintendent and approved by the Federation when annual leave has been taken.

Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or

is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

The Board may require satisfactory *proof of illness* after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to *1/180th* of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

• • •

PLAINTIFF'S EXHIBIT 7 (EXCERPTS) FILED IN
THE DISTRICT COURT ON DECEMBER 12, 1983

CONTRACT
BETWEEN THE
Ansonia Board of Education
and the
Ansonia Federation of Teachers
A.F.T. Local 1012
AFL-CIO

For the Period
JULY 1, 1972 TO JUNE 30, 1974

• • •

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness in the immediate family which requires the presence of the professional staff member, and/or for the reasons, and within the limits stated below:

1. Death in the immediate family.....5 day limit each time
2. Funerals: Family1 day each time
Friend1 day per year
3. Attendance at a family wedding or participation
in a wedding1 day each time
4. Family graduation or
religious ceremony1 day each time
5. Official delegate to National Vet. Org. 3 days per year
6. Legitimate and necessary personal business at the
teachers' discretion, *subject to other provisions of this
Article*3 days per year

Personal business shall not include (without limitation)

- a. Any marriage attendance or participation,
- b. *Day following marriage or wedding trip,*
- c. Attendance at any sport or recreational event,
- d. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal business,
- e. Purposes set forth in 1 through 5 above,
- f. Any religious activity.

The professional staff member shall make all reasonable efforts to plan and conduct such personal business so that it does not conflict with assigned professional duties. The professional staff member must inform the Superintendent in writing on the form developed by the Superintendent and approved by the Federation when annual leave has been taken.

Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

The Board may require satisfactory *proof of illness* after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to *1/180th* of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

* * *

PLAINTIFF'S EXHIBIT 8 (EXCERPTS) FILED
IN THE DISTRICT COURT DECEMBER 12, 1983

C O N T R A C T

BETWEEN THE

Ansonia Board of Education

and the

Ansonia Federation of Teachers
A.F.T. Local 1012
AFL-CIO

For the Period
JULY 1, 1974 TO JUNE 30, 1975

* * *

ARTICLE V

LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness in the immediate family which requires the presence of the professional staff member, and/or for the reasons, and within the limits stated below:

1. Death in the immediate family5 day limit each time
2. Funerals: Family1 day each time
Friend1 day per year

3. Attendance at a family wedding or participation in a wedding1 day each time
4. Family graduation or religious ceremony
1 day each time
5. Official delegate to National Vet. Org. 3 days per year
6. With prior written notice to the Superintendent forty-eight hours prior to such leave, and with reasons stated, three (3) days per year for necessary personal business. Reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business. The professional staff member shall make all reasonable efforts to plan and conduct such personal business so that it does not conflict with assigned professional duties. Personal business shall not include (without limitation):
 - a. Any marriage attendance or participation,
 - b. Day following marriage or wedding trip,
 - c. Attendance at any sport or recreational event,
 - d. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal business,
 - e. Purposes set forth in 1 through 5 above.
 - f. Any religious activity.

Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to

annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

The Board may require satisfactory *proof of illness* after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than personal illness and not authorized herein, a salary deduction equal to $1/180th$ of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where pos-

sible, in advance, so as not to conflict with assigned or required professional duties.

* * *

PLAINTIFF'S EXHIBIT 9 (EXCERPTS) FILED
IN THE DISTRICT COURT ON DECEMBER 12, 1983

C O N T R A C T
BETWEEN THE
Ansonia Board of Education
and the
Ansonia Federation of Teachers
A.F.T. Local 1012
AFL-CIO

For the Period
JULY 1, 1975 TO JUNE 30, 1978

* * *

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness in the immediate family which requires the presence of the professional staff member, and/or for the reasons, and within the limits stated below:

1. Death in the immediate family5 day limit each time
2. Funerals: Family1 day each time
Friend1 day per year

3. Attendance at a family wedding or participation in a wedding1 day each time
4. Family graduation or religious ceremony
1 day each time
5. Official delegate to National Vet. Org. 3 days per year
6. With prior written notice to the Superintendent forty-eight (48) hours prior to such leave, and with reasons stated, three (3) days per year for necessary personal business. Reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business. The professional staff member shall make all reasonable efforts to plan and conduct such personal business so that it does not conflict with assigned professional duties. Personal business shall not include (without limitation):
 - a. Any marriage attendance or participation,
 - b. Day following marriage or wedding trip,
 - c. Attendance at any sport or recreational event,
 - d. Travel in connection with 1 through 5 above or any travel associated with any activity that does not constitute personal business,
 - e. Purposes set forth in 1 through 5 above,
 - f. Any religious activity.

Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual

leave, including accumulated days, shall be used for absence to Religious Holidays in excess of three days per year.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

The Board may require satisfactory *proof of illness* after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to $1/180$ of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

PLAINTIFF'S EXHIBIT 10 (EXCERPTS) FILED IN
THE DISTRICT COURT ON DECEMBER 12, 1983

C O N T R A C T
BETWEEN THE
Ansonia Board of Education
and the
Ansonia Federation of Teachers
A.F.T. Local 1012
AFL-CIO

For the Period
JULY 1, 1978 TO JUNE 30, 1982

* * *

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness and/or illness in the immediate family (spouse, children, parents, and family members residing in household), which requires the presence of the professional staff member, and within the limits stated below:

- *1. Death in the immediate family
5 day limit each time
2. Family funeral attendance1 day each time
3. Friend Funeral attendance1 day each time—
limit of 2 days per year
- *4. Immediated family wedding1 day each time
- *5. Immediate family graduation1 day each time
- *6. Immediate family religious1 day each time
ceremony (Ordination, Vows, Bar Mitzvah, Bas Mitzvah, First Communion, Baptism)
7. Official delegate to national veterans
organization1 day per year

8. Official delegate (President and/or
Business Agent) to national or state
teachers organization1 day per year—
without charge
9. Official delegate (other than President
and/or Business Agent)—(limit of 3)
to national or state teachers or-
ganization1 day per year
10. Mandated religious observance 3 days per year—
without charge
Those holidays which are required by and obliga-
tory due to written denominational law shall be
considered as authorized leave and shall not be
charged to annual leave, including accumulated
days. No annual leave, including accumulated
days, shall be used for absence due to religious
holidays in excess of three days per year.
11. Necessary personal business3 days total
per year
 - A. Necessary personal business1 day per year
Granted at the discretion of the profes-
sional staff member with 48 hour notifi-
cation to the immediate supervisor. Pro-
fessional staff member will note personal
day on the form provided by Board of
Education.
 - B. Necessary personal business with
approval2 days per year
Professional staff member must request
the days for personal business on a form
provided by the Board of Education for-
ty-eight (48) hours prior to such leave.
Reasons for such leave may be stated in
general terms if the professional staff
member is concerned with protecting the
confidential nature of the personal busi-
ness. The professional staff member

shall make all reasonable efforts to plan and conduct personal business so that it does not conflict with assigned professional duties. Exceptions regarding the forty-eight (48) hour notice provision and/or use of prepared form may be made in cases of emergencies.

Necessary personal business shall not include (without limitations):

- a. Marriage attendance or participation;
- b. Day following marriage or wedding trip;
- c. Attendance or participation in a sporting or recreational event;
- d. Any religious observance;
- e. Travel associated with any provision of annual leave;
- f. Purposes set forth under annual leave or another leave provision of this contract.

*NOTE: Immediated family shall be defined as spouse, children, parents, step-parents, grandparents, brothers, sisters, parents-in-law, family members residing in the professional staff members household.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave, but shall not be charged to annual leave, including accumulated days. Any information received by any professional staff member dealing with possible jury

duty shall be communicated to the said professional staff member's principal on the next school day after receipt by the professional staff member. Professional staff members shall make every effort to be excused from jury duty.

The Board may require satisfactory proof of illness after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to 1/180th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

* * *

PLAINTIFF EXHIBIT 11 (EXCERPTS) FILED IN
THE DISTRICT COURT ON DECEMBER 12, 1983

CONTRACT
BETWEEN THE
ANSONIA BOARD OF EDUCATION
and the
ANSONIA FEDERATION OF TEACHERS
A.F.T. LOCAL 1012
AFL-CIO

For the Period
JULY 1, 1982 THROUGH JUNE 30, 1985

• • •

ARTICLE V
LEAVE PROVISIONS

A. Annual Leave

Eighteen (18) days or annual leave cumulative to 180 days shall be granted for personal illness and/or illness in the immediate family (spouse, children, parents, and family members residing in household), which requires the presence of the professional staff member, and within the limits stated below:

- *1. Death in the immediate family
5 day limit each time
- 2. Family funeral attendance1 day each time
- 3. Friend Funeral attendance1 day each time—
limit of 2 days per year
- *4. Immediate family wedding1 day each time
- *5. Immediate family graduation1 day each time
- *6. Immediate family religious1 day each time
ceremony (Ordination, Vows,
Bar Mitzvah, Bas Mitzvah,
First Communion, Baptism)
- 7. Official delegate to national
veterans organization1 day per year

- 8. Official delegate (President
and/or Business Agent) to
national or state teachers
organization1 day per year—
without charge
- 9. Official delegate (other than
President and/or Business
Agent)—(limit of 3) to
national or state teachers
organization1 day per year
- 10. Mandated religious observance ...3 days per year—
without charge
Those holidays which are required by and obliga-
tory due to written denominational law shall be
considered as authorized leave and shall not be
charged to annual leave, including accumulated
days. No annual leave, including accumulated
days, shall be used for absence due to religious
holidays in excess of three days per year.
- 11. Necessary personal business 3 days total per year
 - a. Necessary personal business1 day per year
Granted at the discretion of the professional
staff member with 48 hour notification to the
immediate supervisor. Professional staff
member will note personal day on the form
provided by Board of Education.
 - b. Necessary personal business
with approval2 days per year
Professional staff member must request the
days for personal business on a form pro-
vided by the Board of Education forty-eight
(48) hours prior to such leave. Reasons for
such leave may be stated in general terms if
the professional staff member is concerned
with protecting the confidential nature of the
personal business. The professional staff

member shall make all reasonable efforts to plan and conduct personal business so that it does not conflict with assigned professional duties. Exceptions regarding the forty-eight (48) hour notice provision and/or use of prepared form may be made in cases of emergencies.

Necessary personal business shall not include (without limitations):

1. Marriage attendance or participation;
2. Day following marriage or wedding trip;
3. Attendance or participation in a sporting or recreational event;
4. Any religious observance;
5. Travel associated with any provision of annual leave;
6. Purposes set forth under annual leave or another leave provision of this contract.

*NOTE: Immediate family shall be defined as spouse, children, parents, step-parents, grandparents, brothers, sisters, parents-in-law, family members residing in the professional staff member's household.

Absence due to any judicial proceeding in which the professional staff member is a plaintiff or defendant or is a witness under subpoena shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days.

Absence due to jury duty shall be considered as authorized leave and shall not be charged to annual leave. Immediately upon notice of the possibility of the teacher serving jury duty, such notice shall be communicated to the teacher's principal. All teachers shall make every effort to be excused from jury duty.

The Board may require satisfactory proof of illness after a professional staff member is absent for four (4) consecutive school days on account of illness. Such proof of illness may also be required of a professional staff member's immediate family member if the professional staff member is absent for four (4) consecutive school days on account of the immediate family member's illness.

For absence other than for personal illness and not authorized herein, a salary deduction equal to 1/180th of the annual salary shall be made.

Any travel by a professional staff member, conducted in connection with and/or at the time of any school holiday, vacation, school commencement in September or school termination in June shall be arranged where possible, in advance, so as not to conflict with assigned or required professional duties.

* * *

PLAINTIFF'S EXHIBIT 15 (EXCERPTS) FILED IN
THE DISTRICT COURT ON DECEMBER 12, 1983

SALARY SHEET

SEPTEMBER 1, 1983 TO AUGUST 31, 1984

STAFF MEMBER: Philbrook, Ronald; Assignment:
Business; SCHOOL: A.H.S.

DEGREE—September: 6th Year; DEGREE
CHANGE IN FEBRUARY: YES — NO —

OLD CONTRACT 9/83: STEP Over; BASE SAL-
ARY: 22,720; ADDITION — REASON — ADDITION —
REASON — TOTAL SALARY PAYROLLS: 22,720;
LONG. — TOTAL SALARY RETIREMENT — BENE-
FITS B.C. — COL. — DENT—

NEW CONTRACT 10/83-8/84; STEP. Over; BASE
SALARY: 24,810; ADDITION — REASON — ADDI-
TION — REASON — TOTAL SALARY PAYROLLS:
24,810; LONG.: 350; TOTAL SALARY RETIREMENT:
25,160; BENEFITS: B.C. — COL. — DENT —

1. NUMBER OF PAYROLLS: 2; AMOUNT PER
CHECK: 873.84; TOTAL: 1747.68.

2. NUMBER OF PAYROLLS: 24; AMOUNT PER
CHECK: 960.93; TOTAL: 23,062.32.

BUDGET FIGURES: 1. 10/83/8/84: 23,062.32; 2.
9/84: 1,908.46; 3. LONGEVITY: 350; 4. TOTAL: 25,-
320.78.

COMMENTS, CHANGES OR TERMINATION.

PLAINTIFF'S EXHIBIT #16 (EXCERPTS FROM
THE INVESTIGATIVE FILE OF THE CONNECTI-
CUT COMMISSION ON HUMAN RIGHTS AND OP-
PORTUNITIES) FILED IN THE DISTRICT COURT
ON DECEMBER 12, 1983

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES
90 WASHINGTON STREET,

HARTFORD, CONNECTICUT 06115
TELEPHONE 566-3350
(AREA CODE 203)

IN REPLY ADDRESS TO:

79 Linden Street
Waterbury, Connecticut
August 16, 1974

Mr. Ronald Philbrook
18 Fourth Street
Valley Motor Park
Beacon Falls, Connecticut

Dear Mr. Philbrook:

Re: FEP 412-3

Please be advised that based on the case evidence I
have concluded that probable cause exists and will be rec-
ommending the enclosed "Conciliation Agreement" to At-
torney James Lyons, representing the Ansonia Board of
Education and Attorney Joseph Flynn, representing the
Ansonia Federation of Teachers. The conciliatory confer-
ence is tentatively scheduled for the week of August 26th.
Should the Commission's efforts to conciliate fail the case
will be carefully analyzed by our chief counsel to decide on
certification to a public hearing.

It is imperative that you not discuss the terms of con-
ciliation with representatives of the two parties involved.
If you have any questions please direct them to me per-
sonally.

Yours very truly,

/s/ Bruce R. Julianelle
Field Representative

BRJ/pt
Encl.

P.S. Is the amount \$297.16 correct?

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND
OPPORTUNITIES

In the matter of:
Case No: FEP 412-3

RONALD PHILBROOK,
Complainant
v.

ANSONIA BOARD OF EDUCATION
and the
ANSONIA FEDERATION OF TEACHERS,
Respondents

CONCILIATION AGREEMENT

This Conciliation Agreement is entered into by and between the Connecticut Commission on Human Rights and Opportunities, hereafter called the "Commission," by its authorized representative, Bruce Julianelle and the Ansonia Board of Education and the Ansonia Federation of Teachers, hereafter called the "Respondent."

WITNESSETH THAT:

WHEREAS, a complaint was filed on January 24, 1974 by Ronald Philbrook (hereinafter called the "Complainant"), charging discrimination based on religious creed by his employer and labor organizations, the Respondents and

WHEREAS, the Commission, by and through its duly authorized representative, Bruce Julianelle, found that there was reasonable cause to believe that violation of the statute (Conn. Gen. Statute § 32-126 (a),(c),(d),(e)) have occurred and

WHEREAS, the Respondents, while not admitting violations of the statute have occurred, but nevertheless wishing to conciliate the complaint, entered into negotiations with the Commission said

WHEREAS, the Commission and the Respondents agreed to the following terms of conciliation in lieu of public hearing,

NOW THEREFORE, it is agreed that:

1. The Respondents agree to amend Article V Leave Provisions of their Contract to entitle employees the use of their accumulated personal business days for observance of Religious Holidays.
2. The Respondent shall compensate the Complainant with monetary benefits for lost wages. The Commission and the Respondent agree that the amount of compensation due Complainant is \$297.16.
3. The Respondents agree to file with the West Central Regional Office of the Commission, the following information within thirty (30) days of this Agreement:
 - a. Its completed, revised Leave Provision Policy as amended in accordance with the terms of this Agreement, together with the proposed method of informing all employees of said policy. The Commission will review said Revised Leave Policy and will notify the Respondents, in writing, if said Revised Policy complies with the terms of this Agreement, within thirty (30) days of the receipt of said Revised Policy from the Respondents. If approved by the Commission, the Respondents

will notify all employees of this Policy within ten (10) days of receipt of the Commission's approval.

- b. Verification of payment to the Complainant in accordance with number 2 (2) above.
4. The Commission and Respondents agreed that, when signed this Agreement shall be entered as an Order of the Hearing Tribunal of the Commission with all rights attendant thereto.

IN WITNESS WHEREOF, the parties hereto have on behalf of their respective principals hereunto set their hands and seals at _____, Connecticut on this the _____ day of _____ 1974.

Witness:

Witness:

CONNECTICUT COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES

BY _____ (L.S.)
Its Duly Authorized
Representative
ANSONIA BOARD OF
EDUCATION

BY _____ (L.S.)
ANSONIA FEDERATION
OF TEACHERS

BY _____ (L.S.)
Its Duly Authorized
Representative

Mr. Ronald Philbrook
Complainant

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS AND
OPPORTUNITIES

In the matter of:

Case No.: FEP 412-3

RONALD PHILBROOK

Complainant

v.

ANSONIA BOARD OF EDUCATION
and the
ANSONIA FEDERATION OF TEACHERS

Respondents

CONCILIATION AGREEMENT

This Conciliation Agreement is entered into by and between the Connecticut Commission on Human Rights and Opportunities, hereafter called the "Commission," by its authorized representative, Bruce Julianelle and the Ansonia Board of Education and the Ansonia Federation of Teachers, hereafter called the Respondent."

WITNESSETH THAT:

WHEREAS, a complaint was filed on January 24, 1974 by Ronald Philbrook (hereafter called the "Complainant"), charging discrimination based on religious creed by his employer and labor organization, the Respondents and

WHEREAS, the Commission, by and through its duly authorized representative, Bruce Julianelle, found that there was reasonable cause to believe that violation of the statute (Conn.Gen.Statute § 31-126 (a), (c), (d), (e), have occurred and

WHEREAS, the Respondents, while not admitting violations of the statute have occurred, but nevertheless wishing to conciliate the complaint, entered into negotiations with the Commission and

WHEREAS, the Commission and the Respondents agreed to the following terms of conciliation in lieu of public hearing,

NOW THEREFORE, it is agreed that:

1. The Respondents agree to amend Article V Leave Provisions of their Contract so not to deny employees the use of their accumulated personal business days for observance of Religious Holidays.

2. The Respondent shall compensate the Complainant with monetary benefits for lost wages. The Commission and the Respondent agree that the amount of compensation due Complainant is \$297.16.
3. Respondents agree to file with the West Central Regional Office of the Commission, the following information within thirty (30) days of this Agreement:
 - a. Its complete, revised Leave Provision Policy as amended in accordance with the terms of this Agreement, together with the proposed method of informing all employees of said policy. The Commission will review said Revised Leave Policy and will notify the Respondents, in writing, if said Revised Policy complies with the terms of this Agreement, within thirty (30) days of the receipt of said Revised Policy from the Respondents. If approved by the Commission, the Respondents will notify all employees of this Policy within ten (10) days of receipt of the Commission's approval.
 - b. Verification of payment to the Complainant in accordance with number two (2) above.
4. Provided, however, that if said revised policy submitted in accordance with number one (1) of this

Agreement does not eliminate the unfair employment practice complained of in the Commission's opinion or the verification of payment is not received in accordance with number three (3) b. of this Agreement the Commission will proceed to certify this complaint to Public Hearing.

IN WITNESS WHEREOF, the parties hereto have on behalf of their respective principals hereunto set their hands and seals at _____, Connecticut on this the _____ day of _____ 1974.

Witness:

CONNECTICUT COM-
MISSION ON HUMAN
RIGHTS AND OPPOR-
TUNITIES

BY _____ (L.S.)
Its Duly Authorized
Representative
ANSONIA BOARD OF
EDUCATION

BY _____ (L.S.)
ANSONIA FEDERATION
OF TEACHERS

BY _____ (L.S.)
Its Duly Authorized
Representative

Mr. Ronald Philbrook
Complainant

Rader & Helge
Attorneys at Law
Hilton Office Tower, Suite 540
150 South Los Robles Avenue
Pasadena, California 91101
Telephone (213) 577-5380

April 24, 1974

Mr. James C. Lyons
Attorney at Law
350 E. Main Street
Ansonia, Connecticut 06401

Dear Mr. Lyons:

Your letter of April 2, 1974, to Mr. James Rosenthal, minister of the Worldwide Church of God in Connecticut, has been forwarded to me for answering. I have been general counsel for said church for the past 15 years and am well acquainted with the church's doctrinal position.

As a matter of introduction so that the real issue is not blurred, the question of whether or not the church's holy days are supported by a proper scriptural interpretation is not open to consideration. They indeed are, but neither the church nor its members can constitutionally be subjected to proving the truth of what they believe. It is rather a question of whether or not the holy days are, in fact, bona fide church doctrine, which indeed they are.

The answers to your specific questions are as follows:

(1) The church determines the dates of the holy days in accordance with the commands in Leviticus 23 and Deuteronomy 16 and the Hebrew or "Sacred Calendar" as preserved by the Jews.

(2) There are no central church records indicating the percent of the members who attend the holy days each year.

(3) The church allows members to be excused from attendance on the holy days for reasons of illness, infirmity, and, on some occasions, for lack of funds rendering it impossible to get to the Feast site. This would normally

be in the member's first year after conversion when he had not learned of the church festival in time to save sufficient funds to attend.

(4) If a member fails to attend church holy days through no fault of his own, there would be no adverse consequences. However, the mere fact that his employer would not consent to his attending does not constitute "no fault of his own." A few of the scriptures requiring attendance at such holy days are Leviticus 23:2, Exodus 23:14-17, and Deuteronomy 16:16. The adverse consequences for failure to obey these commands is, (1) that it constitutes a sin, and (2) it may incur the possibility of disfellowshipment from the church.

We would greatly appreciate your giving due consideration to Mr. Philbrook's rights regarding his religious convictions.

Very sincerely yours,
Ralph K. Helge

RKH:bjm

cc: Connecticut Commission on
Human Rights and Opportunities
Attn' Bruce Julianelle
79 Linden Street
Waterbury, Connecticut 06702
James Rosenthal

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES
90 WASHINGTON STREET
HARTFORD, CONNECTICUT 06115

Southwest Regional Office
1862 East Main Street
Bridgeport, Conn. 06610

Telephone:
Area Code 203
384-0328

In Reply Address to:
Southwest Regional Office
December 16, 1975

Mr. Ronald Philbrook
18 Fourth Street
Beacon Falls, Connecticut

*Re: FEP 412-3 - Philbrook V. Ansonia Board of Education
and Ansonia Federation of Teachers*

Dear Mr. Philbrook:

Enclosed herewith is the last correspondence from Mr. Lyons, Counselor for the Ansonia Board of Education.

Needless to say, our continuous endeavors to conciliate this matter and eliminate what we consider to be an unfair employment policy and practice have been futile.

Please be advised that the *Corey V. Avco* decision in the Connecticut Supreme Court indicates that the accommodation of one's religious beliefs is *not* covered under the Connecticut Fair Employment Practices Law.

However, based on the Commission's finding of reasonable cause to believe that the Respondents have violated Title VII of the 1964 Civil Rights Act, as amended, under Section 701 j, which requires the accommodation of an individual's religious beliefs, etc., I will recommend to my superiors that this matter be promptly referred to the Equal Employment Opportunity Commission for action under Title VII based on our investigation.

In summary, I will be recommending that the above-referenced complaint be Administratively Dismissed and referred to EEOC for appropriate action under Title VII.

Yours truly,
/s/ BRUCE R. JULIANELLE
Supervisor

BRJ:vs
c.c. Angelo Serluco, Assistant Director
Betty Green, W.C. Supervisor
Enclosure: 1

STATE OF CONNECTICUT
COMMISSION ON HUMAN RIGHTS
AND OPPORTUNITIES
90 WASHINGTON STREET
HARTFORD, CONNECTICUT 06115

Telephone:
Area Code 203
566-7061

In Reply Address to:

January 27, 1976

Raymond Dool, Deferral Coordinator
Equal Employment Opportunity
Commission
Boston District Office
150 Causeway Street
Boston, Massachusetts 02114

Re: *Philbrook v. Ansonia Board
of Education et al*
C.H.R.O. No. FEP 412-3
EEOC No. TBO -4-0723

Dear Ray:

Enclosed is the case file in the above reference matter. As I had indicated to you on a previous occasion, this case file was investigated by our agency which found reason to believe that the complainant had been discriminated against because of his religion in violation of Title VII of the 1964 Civil Rights Act. Because of a Connecticut Supreme Court decision limiting a Respondent's duty to accommodate under the Connecticut FEP law, we are unable to successfully conciliate this case. We are referring it to you in the hope that EEOC can take prompt action and conciliate this case on behalf of the complainant and any others similarly situated.

Your prompt, personal attention to this matter will be sincerely appreciated. Please keep me informed of EEOC's progress regarding this matter.

Very truly yours,
PHILIP A. MURPHY, JR.
Commission Counsel

PAM: ls

Enclosure

cc: Angelo Serluco, Assistant Director
Mario Vigezzi, Chief of Field Operations

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
DISTRICT OFFICE
150 Causeway Street
Boston, Massachusetts 02114

In reply refer to:
Charge No. 011740723
FEP 412-3 (CCHRO)

Ronald Philbrook
18 Fourth Street
Beacon Falls, Connecticut 06403 Charging Party

Ansonia School System
Howard Avenue
Ansonia, Connecticut 06401

Ansonia Federation of Teachers
AFT Local 1012
Howard Avenue
Ansonia, Connecticut 06401 Respondents

DETERMINATION

Under the authority vested in me by Section 29 CFR 1601.19b(d) of the Commission's Procedural Regulations (September 27, 1972), I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondents are an employer and labor organization, respectively, within the meaning of Title VII and the timeliness, deferral, and all other jurisdictional requirements have been met. Substantial weight has been accorded to the findings of the state agency.

Charging Party alleges that Respondent Employer and Respondent Union have discriminated against him because of his religion (Worldwide Church of God) in violation of Title VII of the Civil Rights Act of 1964, as amended, by administering a collective bargaining agreement which precludes the use of annual leave for absences due to religious observances. Charging Party further alleges that Respondent Union has failed to represent him in violation of Title VII. Respondent Employer and Respondent Union have elected not to submit a position statement concerning the charges.

Evidence obtained by the Commission's representative during the investigation supports the allegations made by Charging Party. *Article V, Leave Provisions*, of Respondents' collective bargaining agreement provides that "absence, not in excess of 3 days per year, for observance of Religious Holidays . . . shall be considered as authorized leave and shall not be charged to annual leave." However, the agreement also specifies that "No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year." The agreement grants 18 days of annual leave which may be used for a variety of other purposes.

Respondent Employer's records show that Charging Party has not been permitted to use annual leave for absences which were required for the observance of his Church's Holy Days. Respondent Union's records show that Charging Party has filed a grievance on this matter which was not processed to resolution.

Title VII requires an employer to make reasonable accommodations to the religious needs of employees where such accommodations can be made without undue hardship on the conduct of the employer's business. In this instant

case, the Respondents have presented no evidence to show that such an undue hardship would be caused by permitting Charging Party to use annual leave for the observance of religious holidays.

From the evidence presented, and a review of the entire record, the Commission concludes that there is reasonable cause to believe that Respondent Employer and Respondent Union are parties to a collective bargaining agreement which discriminatorily precludes the use of annual leave for religious observances, and that Respondent Union has failed to represent Charging Party, both of which constitute violations of Title VII.

A non-alleged, but like and related, issue appropriate for determination concerns the maternity leave provision of the Respondents' collective bargaining agreement. *Article V, Leave Provisions*, of the agreement applies eligibility, duration and benefit limitations to maternity leave which are not similarly applied to leave for other illnesses and disabilities. These limitations contravene the Commission's Guidelines on Discrimination because of Sex, 29 CFR 1604.10(b), which state:

Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written and unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

Therefore, the Commission concludes that there is reasonable cause to believe that Respondents' maternity leave and benefit provisions also violate Title VII.

Having determined that there is reasonable cause to believe the charge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A "Notice of Conciliation Process" is enclosed for your information. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On behalf of the Commission:

/s/ EVERETT O. WARE
DISTRICT DIRECTOR

Date: 11/5/76

Enclosure: (1)

Notice of Conciliation Process

—
EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
DISTRICT OFFICE
150 Causeway Street
Boston, Massachusetts 02114

District Director
Connecticut
Maine
Massachusetts
New Hampshire
Rhode Island
Vermont

CONCILIATION AGREEMENT

In the Matter of:

U. S. EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION

and

Ronald Philbrook

Charging Party

and

Ansonia Federation of Teachers

AFT Local 1012

Respondent

Charge No. 011740723

* * *

Charges having been filed under Title VII of the Civil Rights Act of 1964, as amended, with the U. S. Equal Employment Opportunity Commission, by the Charging Party against the Respondent, the charge having been investigated and reasonable cause having been found, the parties do resolve and conciliate this matter as follows:

Charge No. 011740723

TABLE OF CONTENTS

SECTION		PAGE
I	General Provisions	1
II	Charging Party Relief	2
III	Reporting	2
VI	Signatures	3

SECTION I

GENERAL PROVISIONS

1. The Respondent agrees that the Commission, on request of any Charging Party or on its own motion, may review compliance with this Agreement. As a part of such review the Commission may require written reports concerning compliance, may inspect the premises, examine witnesses, and examine and copy documents.
2. It is understood that this Agreement does not constitute an admission by any Respondent of any violation of Title VII of the Civil Rights Act of 1964, as amended.
3. The Charging Party hereby waives, releases and covenants not to sue Respondent with respect to the matters which were alleged as charges filed with the Equal Employment Opportunity Commission, subject to per-

formance by the Respondent of the promises and representations contained herein. The Commission shall determine whether the Respondent has complied with the terms of this Agreement.

4. All hiring, promotion practices, and other terms and conditions of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended.
5. The Parties agree that there shall be no discrimination or retaliation of any kind against any person because of opposition to any practice declared unlawful under Title VII of the Civil Rights Act of 1964, as amended, or because of the filing of a charge; giving of testimony or assistance; or participation in any manner in any investigation, proceeding or hearing under Title VII of the Civil Rights Act of 1964, as amended.
6. The Respondent agrees to retain the records and to provide the written reports under the section in this Agreement entitled "Records and Reporting." Reports will be furnished to the District Director, Equal Employment Opportunity Commission, Boston, Massachusetts 02114.

SECTION II

CHARGING PARTY RELIEF

7. Respondent agrees to expend all reasonable efforts, including, but not limited to, consultation, collective

bargaining and grievance processing through arbitration, to achieve a labor contract with the Ansonia Board of Education which includes an Article V revised to permit employees to use unlimited accumulated annual leave for the observance of Religious Holidays.

8. Respondent agrees to file a grievance immediately against the Ansonia Board of Education for the purpose of achieving a labor contract which includes an Article V revised to permit employees to use unlimited accumulated annual leave for the observance of Religious Holidays, and for the purpose of obtaining back pay for all persons who have lost wages since January 1, 1972, as a result of absence due to the observance of Religious Holidays. This grievance shall be pursued through arbitration if a satisfactory resolution is not achieved earlier.
9. Respondent agrees that at all bargaining and consultation meetings held with representatives of the Ansonia Board of Education it shall initiate good faith discussions of the use of accumulated annual leave for the observance of Religious Holidays and attempt to achieve a labor contract which includes an Article V revised to permit employees to use unlimited accumulated annual leave for the observance of Religious Holidays. Respondent shall also attempt at these meetings to obtain back pay for all persons who have lost wages since January 1, 1972, as a result of absence due to the observance of Religious Holidays.
10. Respondent agrees that it shall diligently process all grievances received which allege employment discrimi-

nation based on religion, national origin, sex, race or color, and shall notify such grievants in writing that they may file similar charges with the U.S. Equal Employment Opportunity Commission.

11. Respondent agrees that it shall not resist implementation of any equitable resolution to this charge which the U.S. Equal Employment Opportunity Commission may achieve with the Ansonia Board of Education.

SECTION III

RECORDS AND REPORTING

12. The Respondent agrees to report in writing to the District Director concerning the implementation of this Agreement. The first report will be submitted not later than 90 days from the date of this Agreement. Annual reports will be submitted beginning in January 1978 and ending with a final report in January 1980. Each report shall detail any actions taken as part of the implementation of this Agreement, including the names of persons on whose behalf grievances have been processed in accordance with Item #10.

SECTION IV

SIGNATURES

I have read the foregoing Conciliation Agreement and I accept and agree to the provisions contained herein:

Date 6-9-77

/s/ Ronald Phillbrook
Charging Party
Name:

Date.....

Title:
Ansonia Federation of
Teachers
AFT Local 1012
Respondent

I recommend approval of this Conciliation Agreement:
Date.....

James J. Jordan
Equal Opportunity
Specialist

I concur in the above recommendation for approval of this
Conciliation Agreement:

Date.....

Frank Ammons
Supervisory Equal
Opportunity Specialist

Approved on behalf of the Commission:

Date.....

Everett O. Ware
District Director

PLAINTIFF'S EXHIBIT 19 FILED IN THE
DISTRICT COURT ON DECEMBER 12, 1983

ANSONIA PUBLIC SCHOOLS
BOARD OF EDUCATION
SUBSTITUTE RATES

SCHOOL YEAR	CERTIFIED SUBSTITUTE	NON-CERTIFIED SUBSTITUTES- COLLEGE GRADUATES
1973-74	\$25.00	\$20.00
1974-75	\$25.00	\$20.00
1975-76	\$25.00	\$20.00
1976-77	\$25.00	\$20.00
1977-78	\$25.00	\$20.00
1978-79*	\$25.00	\$20.00

*Note: Starting in February, 1979 the rate was changed to \$27.00 for all Substitutes.

SCHOOL YEAR	CERTIFIED SUBSTITUTES/ COLLEGE GRADUATES	NON GRADUATES +2 Yrs. COLLEGE
1979-80	\$27.00	\$22.00
1980-81	\$27.00	\$22.00
1981-82	\$27.00	\$22.00
1982-83	\$27.00	\$22.00
1983-84	\$30.00	\$25.00

DEFENDANT ANSONIA BOARD OF EDUCATION
EXHIBIT B FILED IN THE DISTRICT COURT
ON DECEMBER 12, 1983

WORLDWIDE CHURCH OF GOD
World Headquarters
Pasadena, California

Herbert W. Armstrong
President and Pastor

Office Of
James Rosenthal, Minister

Box 2163 Huntington Station
Shelton, Connecticut 06484
February 11, 1974

State of Connecticut
Commission on Human Rights and Opportunities
79 Linden Street
Waterbury, Connecticut 06702

Attn: Mr. Bruce Julianelle

Dear Sirs:

This letter is to confirm to whom it may concern, that Mr. Ronald Philbrook and his wife Myra are active members of the Bridgeport congregation of the Worldwide Church of God. Mr. Philbrook has been a baptised member since 1968 and his wife since 1966. Their whole family attends our church services and occassional social activities faithfully and supports the Church of God, headquartered in Pasadena, California, financially as well. I am the Philbrooks' minister and know them very well.

The Worldwide Church of God is founded on the belief that Jesus Christ is the devine, all-powerful authority in the universe - under His Father. We teach our membership that it is their duty to pattern their lives after that of Christ and to follow His commandments consistently. Further, we believe and teach that the Holy Bible is the literal, inspired word of God and is the infallable guide in life.

One of the basic doctrines taught in the Bible is that of the weekly Sabbath and Annual Holy Days as outlined in Leviticus 23 and as confirmed and kept by Christ Himself

and His apostles as evidenced in the New Testament. The weekly Sabbath is observed from Friday sunset to Saturday sunset each week. On the other hand, the Annual Holy Days may fall on any day of the week. Each year these Annual Days require that our members be excused from work or school from seven to eleven week days other than Saturday or Sunday in order to participate in church services held on each of these days. For example - this year the Holy Days fall on April 7, 13; June 3; September 17, 26; and October 1-7, 8. This requires our members to obtain ten days off during the week plus minimal travel time.

We stress the keeping of these annual and weekly days in the firm belief that their observance is required as a precondition to the receiving of the gift of eternal life.

For your information, I have included copies of two form letters that we commonly use in assisting our members in obtaining excused time to participate in these Sabbath days.

If I can be of any further help in explaining Mr. Philbrook's spiritual obligations - please feel free to contact me at any time.

Sincerely yours,

/s/ James J. Rosenthal

Enl. 2

DEFENDANT ANSONIA BOARD OF EDUCATION
EXHIBIT C (EXCERPTS FROM THE
DEPOSITION OF ROBERT ZURAW)
FILED IN THE DISTRICT COURT
ON DECEMBER 12, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

Civil Action
No. N-77-489

RONALD PHILBROOK

Plaintiff

VS.

ANSONIA BOARD OF EDUCATION, ET ALS

Defendants

DEPOSITION OF ROBERT E. ZURAW

* * *

(p. 4) ROBERT E. ZURAW, called as a witness, having been first duly sworn by Bonita Cohen, a Notary Public in and for the State of Connecticut, was examined and testified as follows:

DIRECT EXAMINATION

By Mr. Rosen:

Q. Mr. Zuraw, what is your current position with the Ansonia Board of Education?

A. Superintendent of Schools.

Q. How long have you had that job?

A. Since November 13, 1977.

Q. And can you tell us what your position was before November 13?

A. As of September, I was — well, I was Assistant Superintendent, elementary education, special education.

Q. That was September of 1977?

A. Yes. I was Assistant Superintendent prior to that with responsibility for elementary schools as well. In September, I believe it was probably August, I was then named Assistant Superintendent with responsibility for elementary education and special education. The title was the same. My responsibility changed.

• • •

(p. 8) Q. And did you hold that position until this past August or September?

A. Three years ago when Dr. Nicolari was appointed Superintendent, he presented a reorganization where titles were changed. I was then doing basically the same functions and responsibilities but the title was then changed to Assistant Superintendent.

Q. And you kept that position until August of '77?

A. I kept the position but the responsibilities were changed in August again.

Q. Now, Superintendent, what are your duties?

A. Well, what I do is carry out — I am the executive agent of the Board of Education and carry out responsibilities of the system. There are certain duties that by law the superintendent has, you know, as the executive agent.

I am involved in, I would say, probably the overall supervision of the entire school system.

• • •

(p. 15) Q. And how many schools are there in the system?

A. We have seven elementary and one secondary.

Q. How many total students are there?

A. Approximately 300 — 3,000, I'm sorry, 3,000.

Q. And what's the total number of teachers?

A. I believe we have about, total staff probably 250 or so.

Custodians, you know, non-professionals, I believe we must have about 130, probably 140 or 150, I think.

Q. Tell us what each of the schools is.

(p. 16) A. Tell you what each of the schools is?

Q. What are the names of the schools?

A. Well, our secondary school is the Ansonia High School. The elementary schools, first of all, we have the John G. Prendergast School, the John C. Mead School, the Annie E. Larkin School, the Lincoln Marie Hayes School, the Andrew Nolan School, Peck School and what we call the Willis Pine School.

Q. In the Ansonia High School, that is for grades 9 through 12?

A. Yes. It's a four-year high school.

Q. And the elementary schools are K-8 schools?

A. No, they are not.

Q. How are they divided?

A. I think if they were to write a book on education, we would have what we would call our "Ansonia Plan."

The Willis School, or what I call the Willis Pine School is a 6 through 8 school. The Peck School is a K through 5 school. The Larkin School is a K through 5. The Lincoln is a 6 through 8. The Nolan is a K through 5 school. Mead is a K through 2 school. Prendergast School has a pre K and then a 3 through 8. We organize by the number of rooms we have in the school, so they vary.

(p. 17) Q. How many students are there in the high school?

A. Oh, just over 800, I believe.

Q. And how many teachers are there?

A. I would say in the 60s. I don't have the exact number.

* * *

(p. 48) Q. Do you know what subject Ronald Philbrook teaches?

A. Yes. He teaches typing 1, personal typing and bookkeeping 1. I believe.

Q. And are these — what grades are these subjects taught in?

A. The typing 1 right now is for, I believe it's sophomores, juniors and seniors. Next year it will be offered to freshmen.

Bookkeeping 1 is a course for juniors and seniors.

The personal typing is a half-year course for juniors and seniors.

* * *

(p. 49) Q. Does he teach any other subjects than those that you've (p. 50) mentioned?

A. For this year, Ron has period one typing 1; his second period is personal typing; his next course is introduction to business. I said business 1. He has two classes of that. He has another typing 1 and then he has a study period. That's his schedule this year.

Q. Okay. Do you happen to know whether or not in the past he taught courses other than the business typing and personal typing course?

A. I believe he's only in the business department. I don't think he's taught anything outside of that department.

* * *

(p. 52) Q. And what does that mean, each semester how many courses would a student carry?

A. Probably five, five or six courses.

Q. Do you know — withdrawn.

Do you know anything about the content of the courses that Mr. Philbrook teaches?

A. Well, my understanding is that typing 1 is the fundamental course. It's the basic course in typing. It's when they are introduced to the typewriter, to the system. It is a basic skill course and from what I've read in the book, it mentions that accuracy is stressed. It's the first — it's fundamental just as reading would be in the lower grades.

Q. Do you have sufficient typewriters so that all the youngsters in the course have their own typewriters?

A. As far as I know, yes. We're talking probably 25, 30 typewriters in a room. I'm assuming that when the schedule is drawn up, that they don't put 35 children in a classroom that has 25 typewriters.

Q. And the other courses that he taught were —

A. Introduction to business.

* * *

(p. 54) Q. And what are the answering service's instructions about locating — how to locate a substitute?

A. I'm sorry.

Q. How is the answering service instructed to proceed?

A. All right. Fine. If we have a vacancy in the kindergarten or first grade, they will go to the certification of the grade. They will look for someone who is certified K through 8. K through 3, someone who will take — and we have this here, for instance. Someone — well, all subjects, special ed, too, special ed major which means if you're going to have a vacancy in special ed, this is where you're going to go.

Frankly, many of them will say all subjects, particularly those people who are not certified. Our system is such that a certified substitute, one who has a teacher certification is paid \$25 a day; non-certified people, college graduates are paid \$20 a day and if you look at this, our noncertified people will teach anything from K to advanced calculus and there's a reason for that, frankly.

Q. What's the reason?

(p. 55) A. That very honestly and philosophically a substitute really does not do that much teaching.

Q. Tell me about that. What do you base that view on?

A. Well, basically, and we can look here, for instance, you'll see someone here who has down that he's a phys ed major. It may be very likely that that phys ed major may be teaching a third grade where there's reading and what-not. In the lower grades, many times as a principal my experience was that you would get a person who wasn't certified and you would say — or certified even or perhaps this was not their area, please go through the reading, go through the math, please follow the teacher's plan-book as best you can and in most cases you were happy if things were just kind of quiet frankly.

I think one has to realize the difference between having the teacher in the room and having a substitute teacher. You can have that from kindergarten all the way up to high school and in high school it's a little more difficult. At least when I went, substitute meant you had a good — that was your day. The class before, if the guy didn't pull his hair out in ten minutes, let's see if we can beat the record and see if we can get him to scream in five minutes. It's a fact of life.

* * *

(p. 57) Q. How many subs ordinarily come in on a — on the average day or the average week?

A. I couldn't tell you. I know one more instance, one school right after January 1st when we came back, I think, that week we had in one school 24 teachers and we had 9 substitutes. It happens, you know. Another school could

have no one. I really couldn't tell you. I think we're probably talking, it might be possibly to have 15, 20, 25. I couldn't give you the exact figure.

Q. Where is the source for finding that out?

A. Well, what we'd have to do is, I can find it out simply by going through our attendance records. We just have to (p. 58) go through the attendance records and count the number of subs we had in on a certain day. That can be done. It's not impossible.

Q. Perhaps when we come back, you could do that.

A. I'd have to do that back in the office.

Q. I understand.

Would there be a shortcut method by a budget line item or substitute payments that you could look at?

A. Not really. We have a budget line item for substitutes but that's not going to tell us how many, how many subs we're using a day. What does happen, I think I might mention is if they do not get a substitute, the answering service will call and tell us there is no sub available and this is not a common practice but it's not uncommon to happen where there are some days where we do not have subs.

Q. What do the children do then?

A. Well, in that case, it may be, then, for instance, in a building where there might be an assistant principal, the assistant principal might go in. We also have arrangements where some of our people will help out if they perhaps — they may have a student teacher. Therefore, the student teacher is in the room. They'll help out. If there are traveling teachers (p. 59) for phys ed, music

or art, even though it isn't their schedule, everybody will help out to fill that class. In some cases, if it's a small enough class, they must just divide the children. They had this happen in the sixth grade where there were 22 in the room and we couldn't get a sub and because there were quite a few children out, we moved the children to other classes. It's inconvenient and very difficult but it is done.

In the high school, I think what happens in the high school, they probably end up going to study hall. The children don't even have a class. They're assigned to the study hall. The teacher in the study hall, instead of having 30 children, will now have 50 children because that's where all the classes are going into the study hall.

Q. This is if a substitute is not found?

A. Right.

* * *

(p. 64) Q. And do you have — can you tell us how many of these people are certified in the — in business?

(p. 65) A. From looking at this, I would probably say none of them.

Q. How can you tell by looking at it?

A. I would have to say from this, because they don't say special information, but say industrial arts, English, this may be a major. It may be a minor. I would have to, very frankly, — here you have Italian-Spanish major. They would say many times what their major was.

Q. But many of them —

A. From this list I would not be able to tell you. I would have to look at everyone's certification.

Q. You would not be able to tell me how many, if any, are certified in business in particular?

A. Right. I mean, I see one person here has business down, the first person, but it's kind of difficult how she could ever be certified for all those things, music, English, history, math, science, French and business. They don't make them like that any more.

* * *

(p. 69) Q. How it is determined what category of absence any particular absence falls in?

A. That determination is left up to the professional staff member. We have a reporting system where at the end of each week a professional staff member must note his attendance and he must fill out this card if he is absent. He puts down the date, the number, you know, whether he's absent or tardy. That's the way the card is set up — absent or tardy and then the reason, and it is the professional staff member, if he puts down illness, it is assumed he is ill. If he puts down religious holiday, we assume it's for a religious holiday. That determination is made by the professional staff member. He notes why he is absent.

Q. Is a doctor's certificate or substantiation required?

A. I think we say after three or four we may, but as far as I know, we have never taken that action of saying you must. The Board may ask for a doctor's slip. As far as I know, it has never been done.

Q. All right. How about non-medical absences? What substantiation is required?

A. The word of the professional staff member.

(p. 70) Q. And that, in your experience, has not been challenged or questioned by the Board?

A. I feel that the Board assumes that, you know, the people doing this are professional staff members and therefore if he says he's sick, we assume he's sick. If he says it's personal business, we assume that is what he's taking. I don't know of any change that I know of. Someone may ask, well, gee whiz, but it's nothing specific of someone pursuing that I know of and I don't even know if it has been done informally, but it is strictly what the professional staff member says, and all our records are based on what he tells us on his card.

Q. Right.

A. The only thing, the only other step is that the principal must sign the card just to verify that we have one and send it to our office and this is where we keep these records and the cards.

Q. Now, in your 20 years in the school system, have you experienced situations where people would say, well, I've got business to attend to, I think I'll take a sick day, where they actually were not ill?

A. I would say this. As principal of the school, they certainly weren't going to say something like that in front of (p. 71) me. It's obvious they're not to say it because then I'm going to question them. I have not heard of any cases — no one has said it in front of me.

Q. All right.

Mr. Rosen: Off the record.

(Discussion off the record.)

By Mr. Rosen:

Q. Now, have you run into situations or heard of situations where under the leave provisions someone has failed to give the 48 hours notice required for personal business — personal leave?

A. I can't recall exact cases, but I'm sure it's happened. I'm sure something has happened at night and the person will call in and say, you know, and that an exception is made. I can't recall. I couldn't give you exactly what has happened. I'm sure that someone has had something very serious happen to them and they must take a personal day the next day.

Q. In fact, because of the way the answering service runs its business, it really doesn't —

A. I think in this case you'll find they'll probably call the principal and say this happened, I've got to go or do something and we'll say fine. I'm sure the Superintendent will (p. 72) approve it later. We'll note that the person did call me and it was impossible to give 48-hour notice.

Q. Can you tell me what the function is, going through Article V of the contract, go through each of the items, indicate what the basis is for having that amount of leave.

A. You're talking about official —

Q. Well, get in the immediate family. What is the reason for according those particular number of days that have been accorded?

A. I assume that when it was originally agreed to, that it was felt that this would certainly handle the time

of making funeral preparations, the funeral, the time needed after the funeral, I assume. I think at least, the experience that I have had, you're talking probably five or six days at least, unless you're falling into a weekend or something, but that's about it.

Q. And how about funerals for family and for a friend? Why is one day —

A. Again I feel we're speaking of his attending the funeral and the funeral is a one-day affair and I assume this is it. These are all assumptions. I wasn't here when it was drawn up.

(p. 73) Q. I would like to know now, not the motivation for putting it into the contract, but —

A. The limitation?

Q. No. I'd like to know how — whether or not you feel that it's necessary for the running of the school system as a Superintendent to have these provisions.

A. One of the things, I'm not sure if this is correct or if I'm correct, that bargaining agreement is really between the Board of Education and the AFT, and I'm not sure that the AFT or the Board of Education really cared what the Superintendent feels. I'm kind of just a party to this, I would think, you know. I'm not sure.

Q. I understand.

A. I'm not sure when it was negotiated they say what do you think. I'm sure this is something that was negotiated mutually between two groups, and I'm really not sure what the input of the Superintendent was at this time. I don't know.

Q. Well, I would like your views of the impact of each of these things — withdrawn.

Your views of whether you believe that each of these things is reasonable and/or necessary. We understand that they're not because you put them there that because you negotiated — (p. 74) but because they were negotiated. Now, I see that only one day per year is permitted for funeral for a friend.

A. It doesn't say that. One day. All right. I really don't know the one day per year.

Q. What is someone to do if two close friends died during the course of one year?

A. I assume what they are to do is to take the day off and ask permission for the day and they will not be paid for that day. I assume this is what happens.

Q. And what is the justification for not paying them for that day?

A. Again, I think you're going to have to, you know, go back to the original rule. I don't feel I'm in the position to make a justification right now. My position right now is what I must do is this is the contract. My function is to say you took a day off in November for the death of a friend, you're taking it off in December. Unfortunately, you cannot take the second day. That's what I feel my function is.

Q. So, with respect to the funeral of a friend, you're not saying that it would be harmful to the school system to have someone take that second day?

A. Well, in a sense it can be because I think any day (p. 75) frankly, any day that the regular teacher is not in

that classroom is a different situation than when you have a substitute in that classroom. So that, you know, it changes the situation and, frankly, anyone — any day is really — there's a difference between having a sub and having a regular teacher.

Q. Okay. But it's no more harmful than any other day that a teacher is absent which they're authorized to be absent under the contract?

A. I would say probably not.

Q. If someone has the misfortune of having two close friends die during the year, that they go to the second funeral, that's no more deleterious to the school system than the day they missed when they attended the funeral of the first person who died?

A. I'll leave it at that, I guess.

• • •

(p. 77) Q. But if — would you agree that if it should happen to someone, that two people who really are very close friends, and it could happen to anyone, that they both die within a period of a year, you would not feel that person was doing wrong by taking the second day off?

A. Yes, I would, if it says in the contract that he cannot. I think — my function would be, frankly, to put down one day deducted because he took the second day off.

Q. Okay.

A. That would be my interpretation.

Q. You would deduct the day because the absence was not excused under the contract?

A. Right.

Q. But the contract does not limit the number of weddings that someone would attend if they have a large family over the course of a year?

A. That I couldn't tell you as far as what the interpretation of family is. I would have to look back. I don't know how it has been interpreted. I assume it means immediate family. I couldn't tell you, though, it doesn't say (p. 78) immediate family.

Q. That would suggest that the contract makes the distinction between an immediate family and family?

A. Right.

Q. And that attendance at family weddings is permitted whenever someone gets married, someone in the family gets married?

A. Right. There probably is a distinction in the sense that traditionally, and I'm not sure it has anything to do with it here, traditionally, we're talking about weddings on weekends, evening ceremonies. I'm not sure how many people have taken time off for a family wedding as compared to funerals.

Q. Do you have records of absences?

A. I don't believe so. They were just put down — I could check. I don't believe we have any relationship of weddings to funerals.

Q. How do people — what do people put down when they write down the purpose of the leave?

A. I would have to look and see. Some people will say, you know, according to leave provision Article V (a) and that's it many times or they'll make the notation, they probably won't many times put down the reason. I have to check through the (p. 79) cards to see.

Q. Someone might mark leave according to Article V (a) and that would be the official record?

A. I think so.

Q. And that's an accepted practice?

A. I think it may also be V (a) (1). I'd have to check. I'm not sure.

Q. Where would those records be?

A. We're talking about the cards. I would have to look through all the cards and see how many people have written down wedding or have written down funeral.

Q. How extensive would be the card file for the — this current school year?

A. We're talking one file right now.

Q. Do you think you could bring that next time you come?

Mr. Flynn: I'm going to object to the introduction of that, if we go to another deposition.

Mr. Rosen: Okay.

Q. Why don't you bring it anyway and he can object.

A. Okay.

(Discussion off the Record.)

(p. 80) Q. Now, how about Delegate to National Veterans Organization? What is the function of that leave provision for the Ansonia school system?

A. I'm sorry. By "function," —

Q. Why is that — why is it helpful —

A. I'm not sure how long it is in the contract, and again I was not present when the provision was drawn up. I don't know why it was put in there or when it was put in there.

Q. Do you know of any justification for allowing three days a year for that purpose among all the various purposes that people might have for taking a leave?

A. I'm really not sure. I'm not sure why it was put in and I'm not sure if it's used. I would just say I don't know.

Q. And you also — you don't know of any reason that this leave is important to the school system or has some particular justification from the point of view of the school system that requires it or merits it to be specially listed in the contract?

A. I would say, with my limited knowledge of it, I don't know right now. I would have to go back into the history of it to find out why or when. I don't have that information right now.

• • •

(p. 82) Under Article VI of the contract, is it part of your (p. 83) function to determine whether the reasons stated for taking a leave fall within the confines of this subparagraph 6?

A. The organization as it is frankly is that the Assistant Superintendent handles this in conjunction, I think, with the Superintendent and it is determined.

My answer to your previous question was going to be that as Superintendent, I mean, you would have to take each case. The only thing that would be specific is that it could not be any of those, let's say, where it says it should not include.

Q. So, you were the Assistant Superintendent for some years?

A. I was not the Assistant Superintendent who did that. I think Dr. Nicolari had established it where at one time the other Assistant Superintendent, Mr. Matricaria, was reviewing the request for personal business.

Q. How many Assistant Superintendents are there?

A. Right now there's only one. I was Assistant Superintendent and my position has not been filled.

Q. So, your policy when people give notice to you or to a person under you would be that you cannot permit personal business which is specifically excluded by the contract, is that (p. 84) right?

A. Right.

Q. And apart from that, is there anything which you would exclude?

A. I couldn't answer that. It would depend. There are a thousand and one. I really cannot answer that as to what I consider necessary.

Q. Do you know in your years in the school system of any requests being turned down for any reason other

than that it was excluded by the specific terms of paragraph 6?

A. Just this past year we turned down a request for a personal day. It involved a Union official. This year we did not have Teacher Convention Day off. We went to school during Teacher Convention Day. One of the members of the Federation requested a personal business day to go to the AFT convention. It was denied because it was felt that it was not necessary. He was neither a State representative, a delegate or an officer and therefore his request for personal business was denied.

Q. Can you think of any other instances in which your request for personal business has been denied?

A. This one only came to mind because this happened (p. 85) when I was there.

Q. So, what is the answer to my question?

A. No, I can't think of any others. I'm not sure of any others, frankly.

Q. Now, if someone does not use these annual leave days, do they get paid for them when they leave the system?

A. No, they do not.

Q. Is it the usual practice for each professional staff member to use their entire three days each year?

A. Are you speaking of three days for what?

Q. For Article — for subparagraph 6, for personal business leave.

A. Is it common that they do?

Q. Yes.

A. I don't know but I would say I probably don't think so.

Q. Have you ever heard of occasions when a personal business leave was requested in general terms in order to protect the confidential nature of the personal business?

A. I don't know. I'd have to look through and see if someone said general reasons. I couldn't really tell you.

Q. When you say look through, would that be the same (p. 86) card files?

A. It would be the same cards. Different people write things different ways. I'd have to go through the whole thing.

Q. But the reasons given for the personal business leave would be in the card file?

A. Again, what will happen is many people will probably put down Article V, section (a) (6) and say that's the reason.

Q. And —

A. That has been acceptable on the form. Someone may say — well, it may be something verbal between the principal and the person, I don't know, but many times it is written that way just stating what the provision of the contract is.

Q. Now, we talked about this a little before. What happens when someone takes an absence which is not excused or excusable under this article V?

A. You do allow the person to take the absence, and then his salary is deducted on a certain ratio and the ratio is, I think, it may be 1/200th. Now it may be 1/180th. We figure out his salary and divide by 200 or 180 and that is his daily salary that is deducted.

* * *

(p. 89) Q. If there was someone who wanted to attend a wedding of a close friend, why would they not be permitted to do so?

A. Again, because it's, you know, the contract so states. The rationale why people said this ten years ago or five, whenever it was written, I do not have that rationale.

Q. As Superintendent of the school system, do you believe it to be a good policy to permit a day off for necessary personal business but to exclude from that necessary personal business attendance at a close friend's wedding?

A. I'm not sure this is going to be the right answer but, frankly, let's be very honest. As Superintendent, you know, I must enforce what is here. How I feel has nothing to do with it. I am sure when we start negotiations with the Union, I have a bunch of proposals that I'm sure the Union will not like, I'm sure the Board will not like, but all you do, you suggest what is approved is what I will follow and I'm not sure (p. 90) really how do I feel. I'm not sure. I don't think that has anything to do with the question. It's in there. Frankly, that's the way it's going to be.

Q. So there's no — there's nothing sort of necessary about the way the school system is run that requires

marriage attendance for a friend not to be something for which people can take leave?

A. I think I have to go back to something I said before and that is the fact that every time a teacher is not in her classroom, we have an unusual circumstance. It is not the same situation. I think you asked the question does everyone take three days personal business. Does everyone take 18 days. I have a very strong feeling and I think other Superintendents before me did, too, the feeling that if teachers were sick, you were to stay out of school because you were sick. If you weren't sick, you weren't to stay out of school. The 18 days wasn't to say you owe me 18 days, you owe me 3 days. That was there in case you needed it and I think the question of do you pay someone half 180 days — I don't know how many I've lost in 20 years — I have 180 because that's all I can accrue, but thank God if I ever get sick I have those days but I shouldn't take them just because they're there. That's my feeling and I (p. 91) think this is the professional feeling of most teachers; that is, they're to be used if you need them because it's important, you must have that teacher in that classroom. You can't run a school system where the teachers are not always there. I think this is the feeling we have. To say is there anything — the more times teachers are out, the more times you're going to have problems. You have to realize the difference between working with the regular classroom teacher and a substitute teacher. The regular classroom teachers are trained. They've got experience. Their interviews were higher. Frankly, a substitute teacher puts in an application, you know, the saying goes "If the body is warm, we'll take

it," many times. If we find problems, fine, we try to dismiss those, but again it's a different type situation.

So, all these days, you say is it necessary. The important thing is that as many days as possible, and we do not want a teacher to come in sick because that isn't the purpose to say you have to be there 180 days, we don't want her coming in sick, but we want and would like our teachers to be there whenever it is possible and this is the important thing with these provisions, for getting days and reasons.

Q. Your view of each leave provision from going to the (p. 92) National Veterans Organization to going to a family wedding, your view of each of them is that from the school system's point of view, the fewer days a teacher is absent, the better and more days a teacher is absent, the worse?

A. I think it could be worded that way, right.

Q. And that the leave provisions may, whatever has been negotiated with the schoolteachers, you're bound by but with respect to any particular leave, the issue for the school system is the fact that it's going to take a teacher out of the classroom?

A. I think that's the important thing, that you have a teacher out of that classroom.

Q. But as for justifications of the reason that a teacher might be out or might not be out, I take it you don't see much — withdrawn.

That's not really a major issue for you, that justification for the teacher being absent except that you don't want people who are sick in the room?

A. I think the key is, you know, sick people. I think the other justification I have is what has been set here as leave provisions and I must abide by them.

Q. So, the reason for excluding the day following a (p. 93) marriage or a wedding trip, you don't see that that is something that's particularly inherently necessary or important for the school system to have that rule in as opposed to some other rule?

A. May I ask where you're referring to?

Q. B under 6.

A. "Personal business shall not include —"

Q. Right. I mean, the reason for personal business. There's no inherently necessary reason from the point of view of running a school system to exclude the day following a marriage or wedding trip from personal leave, is that right?

A. I'm sorry. Would you repeat that? You're now asking me what?

(The pending question was read.)

A. In running a school system, there is no —

Mr. Sullivan: Do you understand his question?

The Witness: No, I don't.

Mr. Sullivan: If you don't understand his question, tell him.

A. I don't understand.

Q. You don't understand. I have to try to think of another one.

(p. 94) A. I'm confused as to what you're trying to say.

Q. For excluding the day following marriage or a wedding trip, as far as you're concerned, if it were in the contract or out of the contract, the only significance of it to you is that it might increase the amount of leave that the teachers would take, is that right, if that exclusion were removed from the contract?

A. If it was not in the contract, then there's no problem. Is that what you're saying?

Mr. Rosen: Withdrawn.

Q. You don't know why the contract excludes the day following a marriage or wedding trip from personal business days?

A. No, I don't. This was negotiated before I came.

* * *

(p. 101) Q. And would you describe the contents of what has been marked as Plaintiff's Exhibit 13?

A. It is entitled Ansonia Public Schools Report of Absence. These are completed by a professional staff member, and in this file also are cards of non-professional staff members. It's completed on the last day of the week, if they are absent. At that time, they put down if they're absent, or, I should say, tardy as well, and the reason for being absent or tardy. It is signed by the staff member and signed by the principal. It is then sent to our office.

Q. What is the purpose of the principal's signature?

A. First of all, to verify that the dates — it's some (p. 102) thing that has been a procedure for the last 20 years, as far as I know. The card has changed in the last ten years, perhaps, but the thing of having the staff member sign and the principal sign also has not changed. I assume it's just to verify.

Q. Does — is the principal's signature meant to constitute approval or review of the reason given for the absence?

A. I would assume, and again I don't know what the purpose was ten years ago. I assume it was just to look at them. It's also one way of when we want to be sure we have, and when, we call the principal and say so and so has been absent, please have her sign a card.

Q. So, the reason for the principal's signature —

A. I'm assuming, I'm saying, because I don't know what it was ten years ago.

Q. But, in fact, the approval — is the approval or disapproval of the reason for the absence and the payroll adjustment something that is —

A. No, that is not the responsibility of the principal. He simply signs that the person was absent on that day and confirms the date, or if it's tardy, the amount of time tardy. If they leave early, he confirms that. He is not responsible.

Q. Now, I see, without mentioning a name, but taking one (p. 103) card just as an example, would you look at that card? Does one of the cards have indicated on it "personal day"?

A. You happened to take a custodian's card.

Q. I see. Let's take the next card. All right.

A. That is a teacher aid.

Q. Tell me what the difference is between teachers and teacher aids.

A. Probably about \$15,000. A teacher aid is not a certified person. It is someone who works in our special classes or on lunch duty. It is a person who is not certified and simply works on an hourly basis. But they do have a union and a contract.

Q. And in the even that a — withdrawn.

Do teacher aids assist the teacher in the classroom?

A. In the special class, yes.

Q. What is the special class?

A. Where special education students are, resource rooms, classes for mentally retarded and so forth.

Q. Do the teacher aids participate in the classrooms where the general group of students are?

A. No, they do not.

Q. Is this person an aid as well?

(p. 104) A. That's an aid, too. Okay, this is a teacher.

Q. And what is indicated there as reason for absence?

A. Emergency.

Q. Now, is that — is there some indication on the card of who did review of that or what review was done?

A. Review was probably done by, in most cases, the Assistant Superintendent handles the review.

Q. And what's the name of the person?

A. D. Anthony Matricaria. He doesn't sign. He reviews them.

Q. And that card, that listing —

A. I don't know what the emergency is, if that's what you're saying.

Q. All right. But, in any event, that is a sufficient explanation coming from one of your professional teachers for taking a personal day, is it or is it not?

A. I would say the thing would be that is was probably explained verbally. In other words, it was taken verbally. This is just the record on that Friday.

Q. Well, is there — withdrawn.

Now, in some cases, is the approval of the Assistant Superintendent noted on the card? I show you a card for example.

(p. 105) A. In this case it was, yes.

Q. Is — that was done with respect to another card I've shown you as well?

A. Yes, this is the secretary.

Q. So that is it fair to say that in some cases the aproval is given and is noted, and in other cases, the day is claimed by the teacher without that approval procedure?

A. You're talking about prior approval?

Q. Yes.

A. This is only an assumption, I don't know the case. I assumed what happened was that it was an emergency that came up that day, or that, oh, let's say that morning, the evening before, the professional staff member did not — I think in our contract it calls for reasons stated in general terms. Three days for personal — I'm sorry. Prior written notice to superintendent 48 hours prior to such leave with reasons stated. So — I'm sorry. The young man here probably was a normal personal business type thing. He did request a personal business day, and it was so noted by the Assistant Superintendent. This one was an emergency, and it probably occurred without the written prior approval. And this is done in cases of emergency.

If there's a death in the family, you can't plan 48 (p. 106) hours in advance to ask for the day off. So I assume that this is what happened.

I might add that this okay per D.A.M., is not D.A.M.'s signature, it's the secretary's signature, but she has taken it from the request for personal day. He's not signing it, she is.

Q. And do you know how the secretary receives the information that the approval was given?

A. It's on the prior written approval to the superintendent, there is another form.

Q. There is a form for superintendent's approval?

A. For the — right, or his designee.

Q. Where are those forms?

A. Back with Mrs. Savelle.

Q. And what — can you describe those forms to me?

A. Well, instead of yellow, it's white, and I honestly can't think of the title except perhaps Request for Personal Business Day. That would be a logical title. I'm not sure of the title. It's the teacher's name, the school, her class, and then she'll put down the day she is going to be absent and the reason for the absence, and in the corner we have whether it's approved or disapproved on the superintendent's behalf or (p. 107) his designee.

* * *

(p. 126) Q. What is a certification in business education? Withdrawn.

What does a certification in business education particularly equip an individual to teach?

A. I would assume it would be the basic business courses, typing, shorthand, stenography, business machines. He would get involved with business law. Introductory courses in business.

Q. Now, can you tell us — do you know anything of the — of what, if any, attempts were made by the Ansonia Board of Education to accomodate Mr. Philbrook's particular religious requirements?

A. Well, I believe one of the accomodations was the fact that they allowed him to take off additional days for religious holidays beyond the three in the contract. They allowed him to take those days off.

* * *

(p. 136) Q. Your policy of not permitting use of personal days for religious observance does not, to your knowledge, have the effect of keeping teachers in the classroom isn't that right?

A. I don't think it's a question that can be answered yes or no. I'm really not sure what would happen if you said you could take all the days. Maybe there wouldn't be many more people who would say, well, I'm going to take them. I don't know. I don't think it's a question of where you can say yes, it has resulted in people not taking days or no, it hasn't stopped them, but I don't think we're in a position to answer either yes or no on that.

Q. But you did testify last time, did you not, that teachers do not ordinarily take — frequently do not take their full quota of days that are allowed, isn't that right?

A. Frequently, yes.

Q. And it's also your — you say it was your belief that that was — that it was appropriate for teachers to take time off only when they had a valid reason rather than just to (p. 137) use up their own quota of days?

A. I did say that, yes.

Q. And that is, in fact, what happens in Ansonia, is it not?

A. That they only use them if they have valid reasons?

Q. Yes.

A. Speaking for myself, yes, it happens that way. I cannot answer for 175 people.

Q. You mean you only take it for those reasons?

A. Right.

Q. But you're not sure about the others?

A. Right.

Q. Because your system is not a sort of — is not a system that's designed to police reasons?

A. Our people sign their own reasons.

Q. Can you tell me what hardship would fall upon the Ansonia school system if your teachers were permitted to use their personal leave days for religious observance?

A. I think the personal hardship would be, again, depriving the children if a teacher were hired and certified to teach that class. We have them when they're sick and for reasons for personal illness and so forth. If we had this, it (p. 138) would mean more days when our teachers would not be in front of the class teaching their subjects.

Q. So you think that leave should not be permitted for those reasons?

A. I think that teachers should be absent only out of necessity, that they should be in their classrooms working with their children.

Q. Does religious — and you don't recognize religious observance as a necessity?

A. I'm afraid of what this is going to make me be but—

Q. Just answer the question as honestly as you can. You have to do that, but that's all you're required to do.

A. A teacher should not be absent unless she is — and this is a personal opinion — unless she is sick, so she cannot be there and would do harm to the children by being there. Whether or not — I think perhaps there are certain rights that people should have. I'm just concerned, again, about the teacher being in the classroom with the children and to have as few days as possible where she does not have to be there, or he does not have to be there.

Q. Is it your testimony that religious observance is not sufficient necessity for a teacher to be absent from a (p. 139) classroom?

A. I'm not sure this has any bearing on the case because, frankly, what my personal opinion is, has nothing to do with this.

Q. Well, you're here representing the Ansonia School Board in answer to a deposition served on the Ansonia School Board.

A. I believe if the contract says it, I will abide by that contract.

Q. Speaking specifically to Mr. Philbrook's case, you say the hardship on the school board is on the children from his being absent?

A. Right.

Q. But you say that the school board has accommodated him by permitting him to be absent, is that right?

A. Yes.

* * *

(p. 144) Q. What is the total budget?

A. \$4,150,000. Our budget runs somewhere for substitutes in the area of about \$56,000.

Q. And how is that money — how is that \$56,000 spent?

A. On substitutes.

Q. You count the answering service?

A. No. That's the substitute, the number of substitutes.

Q. Now, in addition to the 20 or 25 dollars a day that a substitute is paid, does the school board have any outlay for health or social security?

A. No. We do not pay any benefits for the substitutes.

Q. So the number of days that substitutes — the number of substitutes who have taught over the year can be derived simply by dividing the \$56,000 by —

(p. 145) A. No. First of all, there are two rates. It's \$20.00 for non-certified, and it's \$25.00 for certified. Our contract also called — or at least the agreement we have, is that if a person substitutes for more than 30 straight days in one classroom, she is put on the first step of the salary schedule. So that would automatically jump to \$45.00 or \$50.00. And this happens on long term illnesses and so forth.

Q. Do you know how many people in the — how much of that \$56,000 is budgeted for these long term —

A. It's really not. It's one line item. They just get put in. We don't have a certain amount. It's one figure. They're included in it, and I couldn't tell you. I would have to go back to the books and check it out.

Q. Can you give me an estimate of the number of teachers of the 173 at any given time are substitutes who have been there longer than 30 days?

A. I would imagine, and I can't really give you a figure, what happens with cases now with child bearing leave and so forth, where we have maternity, you may have half a dozen of those where a person will be out six weeks. So what will happen, is the person will be teaching, a sub will be in there for the first 30 days for \$25.00 a day, and if she goes (p. 146) beyond, she then picks up the additional sum. We may get, as far as maternity, maybe a half a dozen a year, if that. And I'm not sure if we had any long term illnesses. You may get one or two, that I couldn't tell you.

The resignation in the middle of the year may end up in a long term substitute. In the past, it's very easy to hire a new teacher. Nowadays, with a drop in enrollments and so forth, what we normally do is hire a long term sub with the possibility being at the onset of next year, that we'll be eliminating the position, and we've done it by attrition. We don't have to lay anyone off. The long term sub is not in the contract, and therefore, we have a reduction there built in. We can reduce one teacher because it's not a person on contract, and it does not mean we have to lay them off. I couldn't tell you if it would be half a dozen a year probably, at the most.

Q. That's half a dozen in which category?

A. The long term. But, again, you're talking — if they're out 40 or 50 days, it's only ten days at a higher rate. The other 30 are at the low rate.

* * *

(p. 156) CROSS-EXAMINATION

By Mr. Sullivan:

Q. I have a few questions in cross-examination.

Superintendent Zuraw, I think that you have testified that Mr. Philbrook, the plaintiff in this case, has been allowed in the past to utilize his three days for religious observance as guaranteed by the contract and to also take, without pay, additional days for the same purpose; is that correct?

A. That's correct. Right.

Q. Now, have those additional days without pay taken by Mr. Philbrook for religious observance, have those been taken with the knowledge of the Ansonia Board of Education?

A. Yes. they have.

Q. And to your knowledge, has Mr. Philbrook ever been disciplined in any way, either by the Superintendent of Schools or anyone acting on behalf of the Ansonia Board of Education for failure to report to school on days beyond the three days guaranteed for religious observance?

A. To the best of my knowledge, no, he's never been disciplined.

Q. What administrative action, if any, would you as Superintendent of Schools, take should you find that a teacher (p. 157) in the school system is tardy or absent without permission?

A. I think, you know, it would have to be somewhat of a question if it happens tardiness according to your contract and policy that the Board established. People who are tardy some days, I believe, eight or nine, we have actually — last year teachers were suspended for having undue number of absences and felt that they — I'm sorry — not absences, but tardiness. Teachers were tardy, I believe the case was nine, and the penalty was set, they were disciplined in that they were suspended for one day without pay and the pay was deducted from the salary.

Absences, right now, I can't recall any since that's happened. My feeling is that the same penalty could be held. It would depend on probably how severe. If it could be, perhaps the person could be suspended without pay for a day, maybe a week. That I could not tell you. I don't know of any happening where this actually happened in the past. But I can see that as being a just discipline as far as suspension, one day, two days, three days. I couldn't tell you how many days. It's possible.

Q. In your capacity as Superintendent of Schools, at least you would see the probability of disciplining a teacher (p. 158) in some fashion if he or she were absent without permission?

A. Yes.

Q. I think you testified previously with respect to your feelings on the use of substitutes in place of regular classroom teachers.

What advantage or disadvantage do you see with regard to the use of substitutes in place of your classroom teachers?

A. Well, first of all, I don't see any advantages at all if you're talking about using a sub in the place of a regular classroom teacher who has been prepared usually in that area of certification, if it's business education, special education, that person has been certified by the State. In most cases, he has experience. The substitutes, first of all, may not be certified. The Ansonia Board of Education right now employs college graduates at one salary level, certified teachers at the second salary level. So that they would not be certified in some cases. In that area, they might be, if they are certified, we could have a physical education teacher, frankly, teaching art. That's the way the answering service so lines up our people.

Q. Have you ever had difficulty in getting certified (p. 159) substitutes to fill in for regular classroom teachers?

A. Yes. We have also had trouble getting non-certified or college graduates. It's a concern that our principals have had, particularly this year, that we cannot get sufficient numbers of substitutes or many days when we have had to get coverage by other means where we invite the children up and traveling teachers and so forth, where the regular classroom teacher plus teaches the special subject and our people have recommended, frankly, that perhaps we consider another step in having people who are going to college, perhaps finished two or three years, perhaps we might hire those as substitutes at a different salary level. So, we do not have the coverage.

Q. If I understand you correctly, not only do you have difficulty in obtaining — getting certified teachers to substitute but you actually have difficulty getting anyone to substitute?

A. Yes, that's correct.

Q. Now, Mr. Philbrook is certified in business education?

A. Yes.

Q. That's correct?

A. Yes.

Q. Based upon your experience as a school administrator (p. 160) for the Ansonia school system, do you have any knowledge as to the availability of certified teachers in the area of business education to serve as substitutes?

A. At the present time, our list of substitutes does not include one who is certified as a business teacher. We just don't have any.

Q. So, I take it that if you do have to provide a substitute for Mr. Philbrook's class, because he is absent by reason of religious observance, you will not be able to find a substitute certified in business education?

A. No, we would not.

Q. You previously testified about the way the answering service handles the process of getting substitutes and I think you mentioned that the answering service has a list of names with telephone numbers?

A. Yes.

Q. Does that listing include specific areas of certification for teachers? In other words, does the answering service have that information when it seeks the substitute?

A. No. They have what levels the people are interested in.

Q. So, if the answering service seeks to provide a (p. 161) substitute for a particular teacher, there would be no concern on the part of the answering service as to what the particular substitute's area of certification is?

A. No, just perhaps they are interested in, frankly, what is their — what they're willing to — can I use the word "willing" to substitute on the high school level.

Q. With respect to the use of substitutes, do you have any opinion based upon your experience with respect to the ability of a non-certified person, for example, to supervise students as compared to a certified teacher, somebody who has trained, from the area of supervision, do you have any opinion as to the comparative difficulties, if there does indeed exist a difficulty?

A. Yes. My opinion is that there is a big difference between a certified or a regular teacher and the non-certified or a substitute teacher in a classroom.

Q. Why is that?

A. Well, first of all, in the high school area — and I think that's why I know you question — people are willing to substitute on the high school area. Discipline is very poor in most cases with substitute teachers. Classes perhaps like English or social studies, where it's read-

ing a certain number (p. 162) of pages or doing something in a textbook, are kind of easily covered.

When we get involved with business courses, machine courses, even perhaps math and science, it's very difficult for a person without the experience and training to come in and handle the class.

First of all, covering the material; secondly, just being able to get some class control. The discipline is very poor in most cases when there's a sub.

Q. It appears to be more difficult, for example, in a typing class — is that one of Mr. Philbrook's?

A. Yes.

Q. Why would it be more difficult to supervise students, for example, in a typing class as compared, let's say, to an English literature class in the high school?

A. In that a typing class, it's an activity class. Children or students should be working on something and certainly you have got to supervise them.

In a lit course or social studies course of that type, a teacher can leave an assignment and say, "Read chapter 27" and they can sit there and read and can kind of watch over them, where a course where they have something to do like type, (p. 163) any business machine or any activity, it's very difficult. You have to know what the kids are doing, you have to be careful of the equipment. It's very expensive.

Q. Now, the collective bargaining agreement between the teachers' Union and the Board of Education provides

for three so-called personal days per year for certain — well, for non-specified reasons, but with reasons stated and I am quoting from the contract, "With prior written notice to the Superintendent 48 hours prior to the subject leave."

Now, in your experience in the Ansonia school system, have you had occasion to see requests for personal days denied?

A. Yes.

Q. Are teachers who are denied such days nevertheless given the option to take the day without pay on occasion?

A. On occasion, yes.

Q. In your experience, do teachers usually take advantage of that option?

A. I would say it's probably 70/30 that they do not. If you say you can take the day off, but you will be docked, in most cases they feel that they do not need the personal business and come to work.

Q. In your experience as an administrator in the (p. 164) Ansonia School System, can you recall a teacher having ever been allowed the use of paid personal day for a religious activity?

A. In addition to the three, you're speaking —

Q. Yes. Distinguishing personal days from no specifically specified —

A. No. We would not allow anyone to use a personal day for religious activity.

DEFENDANT ANSONIA FEDERATION OF
TEACHERS EXHIBIT BB FILED IN THE
DISTRICT COURT ON DECEMBER 12, 1983

ANSONIA FEDERATION OF TEACHERS

and

ANSONIA BOARD OF EDUCATION

CASE NUMBER: 12 39 0032 75

ARBITRATION DECISION

GRIEVANCE RE LEAVE WITH PAY
TO ATTEND RELIGIOUS CEREMONY

DATE OF AWARD: APRIL 9, 1975

This matter was presented to the undersigned at a hearing held in Ansonia, Connecticut, on March 21, 1975, where Joseph Flynn, Esq., appeared for the Federation, and James C. Lyons, Esq., represented the Board.

AGREED SUBMISSION

Under the terms of the Agreement was Ronald Philbrook improperly denied pay for leave taken for religious ceremonies? If so, to what payments if any, is he entitled?

ANALYSIS

Ronald Philbrook, a teacher of Business, has spent some thirteen years in the Ansonia school system. He became a member of the World Wide Church of God on February 17, 1968, some two years after his wife became

a member. His church goes by the Hebrew calendar as set forth in Leviticus 23 of the Old Testament, and while the Holy Days vary from year to year there are several days each fall and spring where church members are obliged to refrain from servile work and attend religious ceremonies.

In the fall of 1974 these Holy Days falling on school days were:

September 17th — Day of Trumpets

September 26th — Day of Atonement

October 1 — First Day Feast of Tabernacles

October 2 — Holy Day — Feast of Tabernacles

October 3 — Holy Day — Feast of Tabernacles

October 4 — Holy Day — Feast of Tabernacles

October 7 — Holy Day — Feast of Tabernacles

October 8 — Last Great Day

Philbrook advised the administration of his need to be absent from school on these days. He was granted permission, and arrangements were made to cover his classes. He was paid for the first three days of absence, but he was denied pay for absences on 10/2, 10/3, 10/4, 10/7 and 10/8. On November 1, 1974 he was informed he was having \$412.05 deducted from his pay because of his absences on those five days.

It is Philbrook's and the Federation's position that he is entitled to pay for four additional days of absence when the reason for his absence was to attend religious

ceremonies. It is claimed that the Board of Education fails to make a distinction between observance of religious holidays and attendance at religious ceremonies. The Federation contends that Article V of the Agreement draws a clear distinction between these two events, by granting one day of annual leave each time a teacher is absent to attend a religious ceremony, and a maximum of three days of authorized leave, not chargeable to annual leave, for absences for the observance of religious holidays.

The Federation argues that the reason Philbrook never before claimed annual leave for participation in religious ceremonies was because his understanding of his religion, and the provisions of the collective bargaining Agreement was not as full or complete in past years as it was in 1974. Also, it points out that in past years where the contract language was the same as now, he at first only lost the amount of money necessary to pay a substitute to cover for him. Then he had 1/200th deducted for each day of absence beyond three, and the deduction this year is 1/180th of his annual salary per day of absence beyond three. Thus it has become more expensive for him to participate in religious ceremonies and it is only natural that he seeks to minimize the increasing salary loss each year.

The Federation maintains that in the July 1, 1968 - June 30, 1969 contract a teacher was limited to one day per year for a "graduation, ordination, etc.", and three days per year for religious Holy Days "which church laws make obligatory." In all subsequent contracts, including the current one, the number of days of leave allowed

for family graduation or religious ceremony, is not restricted to one per year, rather it is limited only by the amount of annual leave a teacher has, and eighteen days of annual leave is granted each year, cumulative to 180 days. The Federation submits that it is clear from this that the parties intended that absence due to attendance at a religious ceremony should not be limited to three days per year such as exists for absence for observance of religious holidays. It is argued that the history of the language clearly supports an intention to view observance of religious holidays as separate and distinct from absence because of participation in a religious ceremony. Moreover, the Federation maintains that the Board's interpretation that participation in a religious ceremony on a holy day when church members are required to attend church, comes within the 3 days per year limitation for absence due to religious holiday, completely ignores the contrary intent as evidenced by the construction of the language and its history, to keep participation in a religious ceremony separate and distinct from the observance of religious holidays.

The Federation submits that Ronald Philbrook has a meritorious claim for an additional four days pay for four days of absence made necessary by his participation in religious ceremonies required by his religion.

. . .

The relevant contract language is found in Article V, and it reads in pertinent part:

"A. Annual Leave

Eighteen (18) days of annual leave cumulative to 180 days shall be granted for personal illness, illness

in the immediate family which requires the presence of the professional staff member, and/or for the reasons and within the limits stated below:

... 4. Family graduation or religious ceremony . . . 1 day each time.

... 6. With prior written notice to the Superintendent forty-eight hours prior to such leave, and with reasons stated, three (3) days per year for necessary personal business. . . . Personal business shall not include (without limitation)

... f. Any religious activity.

... Absence, not in excess of 3 days per year, for observance of Religious Holidays, which absence is required by and obligatory due to written denominational law shall be considered as authorized leave and shall not be charged to annual leave, including accumulated days. No annual leave, including accumulated days, shall be used for absence due to Religious Holidays in excess of three days per year."

A critical review of the evidence and arguments compels the finding that Mr. Philbrook and the Federation are misreading the provisions granting leave with pay for religious reasons, and those provisions can only be read to deny his claim for pay for four additional days of absence caused by his participation in religious ceremonies.

The days in question are listed as *GOD'S HOLY DAYS* on the calendar of the World Wide Church of God, and Philbrook testified that abstinence from servile work, and attendance and participation in religious ceremonies was required on each of these days. He also stated that they could properly be called holy days, although there was a distinction between them as some were High Holy Days.

There can be no dispute that holy day and holiday are synonymous terms, both from their dictionary definitions, as well as in common usage. So when Article V limits to 3 the number of days of paid leave per year due to Religious Holidays, this same limitation is applicable to religious holy days as well.

Viewing the totality of the pertinent contract language one is impressed with the parties' efforts to limit the number of days of paid leave for absence due to religious holidays to three. While the language permits paid leave not in excess of three days per year, and not chargeable to annual leave, for absences required to observe religious holidays, it also provides that personal days may not be used for any religious activity, and it expressly states that no annual leave shall be used for absence due to Religious Holidays in excess of three days per year. I read this as a purposeful restriction against granting more than three days of leave with pay each year for the observance of religious holidays. Not only are teachers restricted from using annual leave to obtain a fourth day of paid leave in a year for observing a religious holiday, they are expressly prohibited from using personal leave for that purpose. The parties emphasis on this restriction is clear for all to see.

Now we come to Philbrook's contention that his absence on four of the five days when he was denied leave with pay, was for participation in a religious ceremony. Let it be said at the outset that Philbrook's sincerity and piety is not questioned for a moment, but the same can not be said of his rationale in separating the concepts of "participation in a religious ceremony", and "the man-

datory attendance at religious services on a church holy day." On each of the days in question, Philbrook agrees that he was required to attend church because it was a holy day. This brings him squarely within the restriction of no more than three days of paid leave per year for observing religious holidays. For this reason alone his grievance must be denied. The fact that he also participated in a religious ceremony on the holy day in question can in no way suspend operation of the three day leave restriction that applies to absences due to religious holidays. His claim that his absence on these occasions was to participate in a religious ceremony and not to observe a religious holiday is totally unconvincing. If it was not for the religious holiday the religious ceremony would not be held.

While the foregoing is dispositive of the grievance here, it must also be said that the Federation's reading of Article V, A, 4. goes far beyond the scope of the plain and clear meaning of the words of Section 4. It says — "Family graduation or religious ceremony 1 day each time." The clear import of these words, especially when viewed in the entire context of the leave provisions treating with religious holidays, is to cover family graduations and family religious ceremonies such as ordinations, investitures, baptisms, etc., as distinct from public religious ceremonies associated with traditional religious holidays. The Federation's restriction of the word "family" to modify only the word "graduation" is clearly wrong both from the points of view of structural soundness and context.

AWARD

Under the terms of the Agreement, Ronald Philbrook was properly denied pay for leave taken for religious ceremonies.

His grievance is denied.

/s/ William J. Fallon
Arbitrator

Boston, Mass.
April 9, 1975

DEFENDANT ANSONIA FEDERATION OF
TEACHERS EXHIBIT FF (EXCERPTS OF
THE DEPOSITION OF RONALD PHILBROOK)
FILED IN THE DISTRICT COURT ON
DECEMBER 12, 1983

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Case No. N 77-489

RONALD PHILBROOK

VS.

ANSONIA FEDERATION OF TEACHERS

DEPOSITION OF RONALD PHILBROOK

December 15, 1978

* * *

[BY ATTORNEY JOSEPH FLYNN FOR
DEFENDANT ANSONIA FEDERATION
OF TEACHERS]

(p. 5) Q How long have you been so engaged as a
school teacher in the Ansonia School System?

A I believe 17 years.

Q What courses do you teach there?

A I teach business courses.

Q Are you a member of any religious denomination?

A Yes, sir.

Q What is the name of that?

A Worldwide Church of God.

Q How long have you been a member of that de-
nomination?

A Approximately, ten or eleven years.

Q Does that religious organization have days of spe-
cial religious observance?

A Yes.

Q On those days, does your religion prescribe cer-
tain conducts?

A I don't think I understand the question.

Q Does your religion prohibit certain conduct or
work on any of those days of special religious observance?

A Yes.

Q What are those days during the course of the
calendar year?

(p. 6) A They vary from year to year. I wouldn't
know right off hand what the days are.

Q Are those days set in relation to other events in
the calendar?

A They outline the scriptures of the Bible.

Q Do these days have names?

A Yes, sir.

Q What are the names of the days on which you
are forbidden by your religious beliefs to work?

A Days such as the Feast of Tabernacles, Atonement
and Unleavened Bread. That's all that comes to my mind,
right now.

Q During the time you have been employed in the Ansonia School System, have you worked on any of those days as they fell through the course of each year?

A Is the question since I have been in the church or when I first started to work for the Ansonia Education Board?

Q The question is during the time you have been employed in the Ansonia School System.

A Yes, I have.

Q Were you a member of your church at the time you worked these days?

A No, sir.

Q Since you have become a member of your church — by the (p. 7) way, would you tell us, for the record, again the name of your church?

A Worldwide Church of God.

Q Since you joined this religious denomination, have you worked on any of those days that you mentioned as days of special religious observance?

A Not that I can recall.

Q Have you, since the time you joined that denomination, engaged in any kind of work on those days?

A No.

Q Are you forbidden normal household work or household duties during this time of special religious observance? I'm speaking now of those days that you referred to, Feast of Tabernacles, Atonement and Unleavened Bread.

A It has nothing to do with anything outside of labor.

Q By your labor, do you mean the normal employment that you have as a teacher in the Ansonia School System?

A No, employment no matter where it would be.

Q In your case, you mean employment in the Ansonia School System?

A Yes.

Q What specific articles of your faith require you to abstain from servile work on those days?

(p. 8) A Repeat that, please.

Q What specific articles of your faith require you to abstain from servile work on those days that we're mentioning, Tabernacles, Atonement and Unleavened Bread and some days you cannot recall?

A On the outline of the Bible, basically, from the Book of Leviticus, set down in the doctrine of the Church of God.

Q Is that doctrine of the Church of God written down in any one place other than in that Scriptural reference that you make reference to?

A I believe it is.

Q Do you have a copy of that?

A No, I don't.

Q Prior to this date, have you seen a copy of that?

A I have seen them in booklet form.

Q Have you, prior to this time, read the specific provisions of this book or booklet, which require abstaining from servile work on these particular days that we're talking about?

A Have I read them?

Q Yes.

A Yes, sir.

Q Do you recall whether this particular book or booklet (p. 9) has any particular name or author?

A I don't really recall, no, sir.

Q To the best of your knowledge, are all other members of this denomination similarly required to abstain from servile work, as we have referred to it, on these days that we have been discussing?

A Yes.

Q Since the date that — question withdrawn. On what date did you join the Worldwide Church of God?

A I can give you a baptism date, but I was attending quite some time before that.

Q When did you first attend the services or any meeting of the members of the denomination called the Worldwide Church of God?

A It was approximately, I believe, it was approximately 1965 to 1967, somewhere in that area.

Q Do you recall whether it was in 1967 or whether it was in 1966 or 1965?

A It would have to — I would assume it would have to be before '67 because my wife was a baptized member, at that time.

Q Does actual affiliation occur at the time of baptism into this faith?

A I'm not sure I understand your question.

(p. 10) Q Do you become a member at the time you are baptized into this faith or are you, in fact, a member prior to the time of baptism when you first attend meetings?

A I'm not sure I can answer that question.

Q You don't know?

A I really don't know.

Q On what date were you baptized?

A February 17th, 1968.

Q That baptism was into the Worldwide Church of God, which you now continue to be a member of?

A Yes.

Q In the year 1965, did you claim the right or did you claim the need to take any time off or any day off on which the Ansonia School System would otherwise have been in session —

A I don't remember.

Mr. Flynn: I'm not through with the question.

The Witness: I'm sorry.

Q — which would have fallen on a day, which coincided with one of these holy days — is that what we

would refer to these as holy days or days of special religious observance?

A I don't remember.

Q In the year 1966, were you required to take any day from your normal employment off because of your religious beliefs (p. 11) as a member of the Worldwide Church of God? May we agree we can refer to these days that we're talking about as holy days?

A Sure.

Q Is that the proper reference?

A Yes, I just can't remember for sure the days now. It was so long ago.

Q You don't recall any, at this time?

A If I had been attending, yes, sir, I must have, but I just don't recall the dates.

Q You don't remember, however, whether you did have to attend any religious observance or refrain from servile work on any school day, in 1966?

A I don't remember. They might have fallen on weekends, I just don't remember.

Q You are not sure that any of these days of holy days or special religious observance fell on any school day on which you would have been otherwise been employed teaching, in 1966?

A They may have.

Q You are not sure that they did, is that correct?

A I am not positive just how many I attended back at that time.

Q Do you know of any specific day in 1966 where you were required to refrain from servile work and, mainly, I'm talking (p. 12) about employment of the school teacher in the Ansonia School System, in the year 1966, of which was also a school day?

A I really don't remember.

Ms. Wasserman: Isn't that the same question you already asked and he said that he couldn't remember?

Mr. Flynn: Read back that first question.

(The last two questions and answers were read back by the reporter.)

Q In the year 1967, were you required to abstain on any day from normal employment in the Ansonia School System because of the fact that one of these holy days fell on that one or more school days?

A I just don't remember these dates, at this time. I may have, I just can't remember the dates.

Q In the year 1968, either before or after your date of baptism, which you testified was February 18th, 1968, were you required to abstain from your normal employment in the Ansonia School System to observe any of these religious days or holy days we have discussed?

A Was I required — was that the question?

Q Were you required to abstain, yes.

A Probably not, if I was new in the church. I'm not sure of that. I can't remember exactly. It's one of these things where (p. 13) we grow in knowledge and understanding.

Q Did you lose any time from your normal employment in the year 1969 because of the requirement to abstain from servile work on any of these holy days?

A I would assume that I must have. I, again, don't remember the dates.

Q Would you remember the number of dates during that year?

A No, sir.

Q Would you remember whether you were required to abstain from your employment in the Ansonia School System in any subsequent year 1970, 1971, '72, '73, '74, '75, '76, '77 and '78, on any school day because of your holy days?

A No, I can't because they fluctuate every year. Many times they fall on weekends or during school vacations. That's why I can't possibly answer that.

Ms. Wasserman: Off the record.

(Discussion off the record.)

Mr. Flynn: Back on the record. Would you read back the last question.

(The last question was read back by the reporter.)

Q I take it your answer means you are so required to abstain?

A Yes, sir.

(p. 14) Q In the calendar year 1978 — I'm talking now that period of time from January 1st, 1978 to the present date, December 15th, 1978 — how many days which

were school days, were you required to abstain from your employment to observe these holy days?

A I don't remember the exact number, right now.

Q Do you recall how many of those days you might have taken you were not paid for?

A None in '78.

Q In the year 1977, were you required to — you've testified, I believe, you were required to abstain from work on certain school days because of your holy days. Were there any days in that calendar year, January 1st of '77 to December—1st of '77—for which you were not paid?

A No, I don't, think so.

Q In the year 1976 — again, calendar year I'm talking about — were there any days within that year, which you had to take off from your employment to observe these holy days for which you were not paid?

A I'm not sure. I think I was that I wasn't paid for, but I'm not positive.

Q Let me ask you this same question about the year 1975 calendar year. Do you recall any days in that calendar year for which you were not paid, for which you were required by your (p. 15) religious beliefs to take off from school, to refrain from servile work?

A There were some.

Q Do you recall how many those were?

A No, I don't recall how many.

Q Were there any of these kinds of holy days that fall on school days where you were required to take off from work for which you were not paid in the year 1974?

A I believe so.

Q Do you recall how many there were?

A No, sir, I don't.

Q Were there any of these days in 1973 for which you were not paid?

A I believe so. I think that's when I filed the charges.

Q Do you recall about how many days?

A No, I don't.

Q In the year 1972, would you recall how many days you were not paid for due to holy days falling on school days?

A I'm just not positive. I just don't remember for sure exactly when the year was.

Q Would you remember this kind of information for the year 1971 or 1970?

A No, sir, I don't remember for sure.

* * *

[BY ATTORNEY LAWRENCE CAMPANE FOR THE DEFENDANT ANSONIA BOARD OF EDUCATION]

(p. 28) Q In other words, if you volunteered your time to teach a class at the high school on drug education, for which you receive no economic benefits or rewards, that would not be deemed to be servile work?

A It may not be servile work, but I would be able to do that on a particular holy day.

Q You would not be able to do that on a holy day?

A No.

Q On these holy days, are you allowed to go outside of your home and the place of worship?

A We have to travel back and forth to the place of worship.

Q Other than traveling back and forth to your place of worship and your home, are you permitted to go other places?

A It's a practice that we don't use it for personal amusement or anything of that nature.

Q So, in other words, movies or other activities would not be permitted on these particular days?

A No, this is strictly for worship and family relationships of the Bible.

* * *

(p. 35) Q What I'm referring to is whether in September, the beginning of the school year, had you ever given to the Board of Ed. or one of the school administrators a list of the holy days and when they would fall?

A I really don't remember.

Q In the eleven years or so that you have been a member of the Worldwide Church of God, have you at all times been a member in good standing?

A Yes, sir.

Q Within your church, are there classifications of religious membership? Do you understand what I'm trying to point out?

A No, I don't.

Q In other words, are there levels of religious development that you attain — this is a tough one. Are there levels of religious development within your church where after a certain (p. 36) number of years you would become an Elder or some such word?

A I just don't know. I have no way to answer that.

Q Now, if I recall and understood you correctly, in answering one of Attorney Flynn's questions you stated that the requirement of abstaining from servile work may not have been required of you when you were first baptized. Did you say something to that effect?

A I don't recall saying that. I'm not sure.

Q Would the requirement of abstinence — when I say abstinence, I mean abstinence from work, be applicable to you when you were first baptized into the church?

A Repeat that question please.

Q Would the requirement of abstaining from servile work be applicable to you when you were first baptized into the church?

A It may have been. I am not positive of that. I'm not sure.

Q Why do you have this unsureness about this area?

A I'm unsure because at the time it may have been permitted or may not have been permitted, based on the

understanding at the time of baptism. That's why I'm not sure. I can't remember.

Q When you say "based on the understanding at the time of baptism", are you speaking of your own understanding or are you trying to allude that there may have been a change within the (p. 37) church's doctrine?

A My own understanding.

Q Your own understanding, okay. To your knowledge, since the date of your baptism — withdraw that question. To your knowledge, has there been a time when your church doctrine changed, so that it now required abstinence from servile work, whereas before work was allowed on these holy days?

A Not to my knowledge.

Q In 1965, do you recall whether there was a collective bargaining agreement between the Ansonia Board of Ed. and some employee organizations?

A I don't remember.

Q In your complaint you stated that when you first joined the Worldwide Church of God you were able to use your annual personal leave for the holy day observance.

A Is that a question?

Q This is what is states in your complaint.

A Okay. I mean, I don't know. I don't have the complaint.

Q I would be more than happy to let you look at it. This is the first sentence of Paragraph 8. "When Plain-

tiff joined the Worldwide Church of God, he was able to use his annual personal leave time for observance of his church's holy days." That is a statement contained in the complaint.

(p. 38) A Okay.

Q Now, when you referred to "annual personal leave", was this leave provided you by virtue of a collective bargaining agreement?

A I wouldn't be able to answer that unless I can see the contract we had at that time, '67 or '68. I don't remember.

Q Since you've been a teacher in Ansonia, do you recall a time when there was not a collective bargaining agreement?

A Definitely.

Q There was a time when there was not an employee organization representing the teachers?

A We had an organization but we had no contract.

Q Did the school district have a policy, a Board policy, which provided annual personal leave?

A They may have, but I just don't remember.

* * *

(p. 43) Q Now, my question to you, is whether or not you have ever been granted such an absence by the Board of Education for a day when you observed one of the church's holy days?

A Yes, I have.

Q Okay, you have. That answers my question. I'm sorry it took so long.

Ms. Wasserman: I thought that's what your question was.

Q Now, also, looking at Paragraph 10, in the middle, it states that at all times you have expressed a willingness to have your days of religious observance deducted from your personal leave days. Now, have you ever conveyed this willingness, in writing, to a member of the Board of Ed. or the Superintendent of Schools?

A Yes, I have.

Q Do you have a copy with you today?

A No, sir. It should be in the file of the Board of Education or the superintendent.

Q This would have been a letter?

A Yes, sir. It would be Dr. Nicoleri.

Q Can you estimate the date of that letter?

A I will estimate around '75. 1975.

Q Can you recall whether you have had a conference with (p. 44) the Board of Education and/or the Superintendent of Schools concerning your claim that you should be allowed to utilize your personal leave days for these holy day observances?

A What was the question?

Q Have you had a conference with the members of the Board of Ed. or the Superintendent of Schools concerning this issue?

A I wasn't allowed to get to the Board of Ed. but I did have a conference with Dr. Nicoleri. I have had conferences with the federation president to try to bring this about.

Q The conferences which you are alluding to with Dr. Nicoleri, would these have occurred prior to the letter you have previously referred to that you sent to him?

A I don't really remember.

Q Would it have occurred about the same time? In other words, did this conference occur because of the letter you sent to Dr. Nicoleri?

A It wasn't based on the letter being sent, no. I think I might have even had a conference with Mr. Elahan, when he was superintendent.

* * *

(p. 50) Q (By Mr. Campana) Mr. Philbrook, based on your experiences as a high school classroom teacher, do you think that a student gets as much out of a class, educationally, when there (p. 51) is a substitute in the class, as compared to his normal classroom teacher?

A It could be very doubtful.

Q It's often been heard and stated that students look forward to a substitute. It's just like a day off or it's free time. Do you find this to be the opinion of students at the high school?

A In some cases, they feel better that there's not a substitute in. It depends on the teacher.

Q From an educational point of view, given that the purpose of schools are to educate, the classroom teacher is better equipped and better able to educate the students than the substitute?

A He or she should be.

No. 85-495

Supreme Court, U.S.

FILED

MAR 31 1986

JOSEPH F. SPANIOL, JR.

CLERK

In The
Supreme Court of the United States
October Term, 1985

ANSONIA BOARD OF EDUCATION, ET AL.,

Petitioners,

vs.

RONALD PHILBROOK, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

THOMAS N. SULLIVAN
646 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-2141
Counsel of Record for Petitioners

On the Brief:

ROBERT J. MURPHY
LESLIE A. COLLINS
Hartford, Connecticut

40P

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that respondent established a *prima facie* case of religious discrimination under Title VII based upon the petitioner school board's refusal to provide him with additional paid leave for religious observance?
2. Whether Title VII requires an employer, absent a showing of undue hardship, to accept an employee's proposed accommodation to the employee's religious beliefs where the employer has already made a reasonable accommodation to those beliefs?

LIST OF PARTIES

Petitioners are the Ansonia Board of Education, Nicholas Collicelli, Dr. Charles J. Connors, Kenneth Eaton, William Evans, Del Matricaria, Susan Schumacher, Faith Tingley, and Robert E. Zuraw.

Respondents are Ronald Philbrook, Ansonia Federation of Teachers, Local 1012, AFL-CIO; Jose Neves, Kathleen Roberts, Mary Ghirardini, Dennis Gleason, Dominick Golia, Maureen Wilkinson and Georgette Williams.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Statement	4
Summary of Argument	8
Argument	12
I. Philbrook has failed to establish a <i>prima facie</i> case of religious discrimination under Title VII based upon the school board's refusal to provide him with additional paid leave for religious observance	12
A. The school board's leave practices do not conflict with Philbrook's religious beliefs	14
B. The school board's provision of three days of paid leave to all teachers for religious observance constitutes a significant accommodation to Philbrook's religious needs	15
C. Discrimination does not arise under Title VII merely because the school board's leave provisions are "less than all inclusive."	18
II. Title VII does not require an employer to implement an employee's proposed accommodation to the employee's religious beliefs where the employer has already made a reasonable accommodation to those beliefs	22
A. Once an employer has implemented a reasonable accommodation to the employee's religious practices the statutory inquiry ends ...	22
B. Even if the school board is required to consider Philbrook's proposals, the implementation of these proposals would cause the school board undue hardship	25

TABLE OF CONTENTS—Continued

	Page
C. Implementation of Philbrook's proposals would also lead to preferential treatment con- trary to the intent and purpose of Title VII ...	28
Conclusion	31
Appendix A—Summary of Philbrook Absence Rec- ords and Financial Data	App. 1

TABLE OF AUTHORITIES

	Page
CASES	
<i>Abington School District v. Schemp</i> , 374 U.S. 203 (1963)	30
<i>American Postal Workers v. Postmaster</i> , 781 F.2d 772 (9th Cir. 1986)	24
<i>Braunfeld v. Brown</i> , 366 U.S. 599 (1961)	15, 25
<i>Brener v. Diagnostic Center Hospital</i> , 671 F.2d 141 (5th Cir. 1982)	10, 13, 23, 24
<i>California Teachers' Association v. Board of Trustees</i> , 70 Cal. App. 3d 431, 138 Cal. Rptr. 817 (1977)	24
<i>Chrysler Corp. v. Mann</i> , 561 F.2d 1282 (8th Cir. 1977), cert. denied, 434 U.S. 1039 (1977)	23
<i>City of Los Angeles, Department of Water and Power v. Manhart</i> , 435 U.S. 702 (1978)	9, 13, 14, 20
<i>Committee for Public Education and Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1975)	30
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	16
<i>Estate of Thorton v. Caldor, Inc.</i> , — U.S. —, 105 S.Ct. 2914 (1985)	9, 21
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	30
<i>General Electric Company v. Gilbert</i> , 429 U.S. 125 (1977)	9, 14, 18, 19, 23
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974)	21
<i>Nashville Gas Co. v. Satty</i> , 434 U.S. 136 (1977)	13
<i>Newport News Shipbuilding and Dry Dock Com- pany v. EEOC</i> , 462 U.S. 669 (1983)	19

TABLE OF AUTHORITIES—Continued

	Page
<i>Philbrook v. Ansonia Board of Education</i> , 757 F. 2d 476 (2d Cir. 1985), <i>cert. granted</i> , 106 S.Ct. 848 (1985)	13, 17, 22
<i>Pinsker v. Joint District No. 28J</i> , 735 F.2d 388 (10th Cir. 1984)	8, 10, 13, 15, 23, 24
<i>Rankins v. Commission on Professional Competence of Ducor</i> , 154 Cal. Rptr. 907, 593 P.2d 852 (1979)	24
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	8, 14, 15, 21, 25
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981)	8, 14, 15, 25
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	<i>passim</i>
<i>Turpen v. Missouri-Kansas-Texas Railroad Co.</i> , 735 F.2d 1022 (5th Cir. 1984)	13
<i>Steelworkers v. Weber</i> , 443 U.S. 193 (1979)	11, 28
 CONSTITUTION AND STATUTES	
Amendment 1 of the United States Constitution	2
Title VII of the Civil Rights Act of 1964, as amended,	
§ 703(a), 42 U.S.C. § 2000e-2(a)	2, 12, 13
§ 701(j), 42 U.S.C. § 2000e(j)	3, 12
 REGULATIONS AND RULES	
29 C.F.R. § 1605.2(c) (1985)	3, 4, 22
 LAW REVIEW ARTICLES	
Note, <i>Religious Discrimination in the Workplace—A Comparison of Thomas v. Review Board and Title VII Cases</i> , 33 Syracuse Law Review 843 (1982)	15

No. 85-495

—o—

In The
Supreme Court of the United States
October Term, 1985

—o—

ANSONIA BOARD OF EDUCATION, ET AL.,
Petitioners,
vs.

RONALD PHILBROOK, ET AL.,
Respondents.

—o—

**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

—o—

BRIEF FOR THE PETITIONERS

—o—

OPINIONS BELOW

The opinion of the court of appeals (App. to Pet. for Cert. A, 1a-24a) entered March 7, 1985, is reported at 757 F.2d 476. The opinion of the district court (App. to Pet. for Cert. C, 26a-37a) is not reported.

—o—

JURISDICTION

The decision of the Court of Appeals for the Second Circuit (App. to Pet. for Cert. A, 1a-24a) reversing the judgment of the district court was entered March 7, 1985. A petition for rehearing was denied (App. to Pet. for Cert. B, 25a) on June 7, 1985. Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including September 25, 1985. The petition for a writ of certiorari was filed on September 20, 1985 and was granted on January 21, 1986. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATUTES INVOLVED

Amendment 1 of the United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Title VII of the Civil Rights Act of 1964, As Amended (excerpts) Section 703(a):

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. 42 U.S.C. § 2000e-(2)a.

Section 701(j):

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e (j).

Guideline § 1605.2(c) of the United States Equal Employment Opportunity Commission ("E.E.O.C."):

When there is more than one method of accommodation available which would not cause undue hardship, the commission will determine whether the accommodation offered is reasonable by examining:

(i) the alternatives for accommodation considered by the employer or labor organization; and

(ii) the alternatives for accommodation, if any, actually offered to the individual requiring the accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer

or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities. 29 C.F.R. § 1605.2(c) (1985).

—o—

STATEMENT OF FACTS

The plaintiff-respondent, Ronald Philbrook, has been employed by the defendant-petitioner, Ansonia Board of Education, as a high school business teacher since 1962. (J.A. 4-15, 17) In 1968, Philbrook was baptized a member of the Worldwide Church of God, the tenets of which require that members refrain from servile work on designated holy days as a condition of receiving eternal life. (J.A. 17-18)

Since the 1967-68 school year, collective bargaining agreements between the Ansonia Board of Education and the Ansonia Federation of Teachers, Local 1012, AFL-CIO, the bargaining representative of Ansonia teachers, have entitled Philbrook and other teachers in Ansonia to three days of paid leave to observe religious holidays. (J.A. 71-101) Since the 1969-70 school year, Philbrook and other teachers in Ansonia have been provided eighteen days leave per year for illness, which leave is cumulative to 180 days. (J.A. 76-101) The three days of paid leave to observe religious holidays are not charged against a teacher's annual accumulation of paid leave. Thus, a teacher who chooses to take three days of paid leave for the observance of religious holidays is still entitled to eighteen additional days of paid leave. (*Ibid*)

A teacher's eighteen days of annual leave may also be used for purposes other than illness as follows: five days for a death in the immediate family, one day to attend the funeral of a friend, one day to attend a wedding in the immediate family, one day to attend a graduation ceremony, and three days to attend to "necessary personal business." (*Ibid*) Pursuant to the explicit language in the collective bargaining agreements since 1969, the three days allotted for "necessary personal business" may not be used for those reasons for which paid leave is otherwise provided nor may these days be used for activities which may be scheduled during other than working hours. (J.A. 53-54, 64-65) To insure that Ansonia teachers conform to the job attendance rules, the school administration monitors the use of all types of leave by requiring teachers to declare the reason for the absences in writing. (J.A. 52, 152-156) Absences are subject to approval by the Superintendent's office. (*Ibid*) Since the 1978-79 school year, teachers have been allowed to take one day of the three days of necessary personal business leave without advance approval. (J.A. 94-101) Teachers, however, are cautioned that this one day of necessary personal business leave may not be used for reasons for which leave is provided under the collective bargaining agreement. (J.A. 64-65) A teacher who violates the leave provisions risks being disciplined. (J.A. 164) In addition, a teacher whose absence is not excused or who is absent for more than the number of days allotted under the leave provisions of the bargaining agreement is docked a day's pay for each absence. From the 1967-68 to 1970-71 school year the amount docked was equivalent to 1/200 of the teacher's annual salary. (J.A. 73-81) Since the 1971-72 school year, a teacher absent for

an unexcused reason has been docked an amount equal to 1/180 of his annual salary. (J.A. 82-101)

Under the terms of the collective bargaining agreements governing since 1974, teachers have been required to request leave for necessary personal business forty-eight hours prior to such leave. (J.A. 88-101) With regard to absences arising from illness or emergencies, an Ansonia teacher is required to contact an answering service on the morning of his absence to notify the school administration so that a substitute may be employed. (J.A. 55-56). Ansonia has had difficulty in obtaining certified substitutes and, more particularly, substitutes certified to teach the business courses for which Philbrook is responsible. (J.A. 56) As Philbrook admits (J.A. 194), and as the Superintendent of Schools, Robert Zuraw, testified (J.A. 57), little learning occurs when a substitute is called upon to take over a class. Moreover, substitutes have generally had difficulty in maintaining classroom discipline and on a number of occasions school property in Philbrook's classes has been damaged by students when substitutes have been in charge of the class. (J.A. 57-59)

As a member of the Worldwide Church of God, Philbrook is required to refrain from work on three to six days during the work year.¹ (J.A. 20) Dissatisfied with the existing work requirements, Philbrook has requested that he be exempted from the restrictions in the collective bargaining agreement which limit the number of days of paid leave available for religious observance. (J.A. 105) In the

¹ Although Philbrook testified that his religion requires that he be absent from school three to six days per year (J.A. 20), during the 1974-75 school year he was absent ten days for religious reasons (P.X.-14).

alternative, Philbrook requests that he be allowed to pay the cost of a substitute instead of being docked a day's pay. (J.A. 23) In order to accommodate Philbrook's need to refrain from work on more than three days, the school board has waived the job attendance requirements and allowed him to be absent without pay beyond the three days paid leave guaranteed under the collective bargaining agreement. (J.A. 54) From the 1970-71 school year to the present, Philbrook has consistently availed himself of the religious leave sections of the agreement, taking three days of paid leave in each school year. (PX-18) It has been the practice of the school board to deduct a day's pay from Philbrook's salary for each day in excess of the three claimed by Philbrook to have been taken for the observance of holy days. (J.A. 53-54) However, since the 1976-77 school year no pay has been deducted because Philbrook has either chosen not to take a day off without pay in order to observe holy days or has scheduled hospital visits on holy days thus causing absences to be charged to his sick leave entitlement.² (J.A. 36-37)

² One other teacher, an Orthodox Jew, has received a salary deduction for absences in excess of three occurring as a result of her religious observances. (J.A. 54-55) A summary of Philbrook's absence records and salary data is contained in the appendix, *infra*.

SUMMARY OF ARGUMENT

A. Philbrook contends that the school board's refusal to grant him paid leave to observe all of his religious holidays constitutes religious discrimination in violation of Title VII. Under standards articulated by this Court in cases involving the free exercise clause of the first amendment, which are instructive in construing Title VII's ban on religious discrimination, and in cases specifically dealing with discrimination within the context of Title VII, Philbrook has not established a *prima facie* case of religious discrimination.

The bargaining agreement covering the school board's teachers contains leave provisions which are facially neutral in that they provide all teachers three days paid leave for religious observance, additional paid leave for other specified secular reasons, and three days necessary personal business leave. Because Philbrook is neither required to choose between his employment status and his religion, nor required to forego a benefit to which he would otherwise be entitled because of his religion, he has not established a case of discrimination based on religion. Cf. *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas v. Review Board*, 450 U.S. 707 (1981). See also *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984). Far from operating to discriminate against Philbrook, the school board's provision of three days paid leave to all teachers for religious observance and three days paid leave for necessary personal business constitutes a significant accommodation to both the secular and religious needs of the school board's teachers. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 70 (1975). The fact that the school board has further accommodated Philbrook by providing him leave without pay for religious observance in addition

to the three days paid leave guaranteed under the bargaining agreement only serves to weaken his claim of discrimination.

Philbrook also contends that the school board's leave provisions are discriminatory because the bargaining agreement's provision of three days paid leave for religious observance does not meet his need for religious leave while the needs of some of the school board's teachers are fully met. However, discrimination on the basis of religion does not arise merely because the school board's leave provisions are "less than all inclusive." Cf. *General Electric Company v. Gilbert*, 429 U.S. 125, 138-139 (1977). To hold otherwise would require an employer who has no paid leave program at all to provide employees all the paid leave they need for religious observance in order to avoid a violation of Title VII. Finally, Philbrook has not shown that he would have been treated differently in the provision of paid leave benefits but for his religion. Cf. *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978).

Not only has there been no discrimination against Philbrook, but Philbrook has been receiving an additional benefit, unpaid leave beyond the three days paid leave guaranteed under the bargaining agreement for religious observance. Accommodating Philbrook in either of the ways he prefers by providing him whatever paid leave he needs for religious observance or paid leave less the cost of hiring a substitute, would result in the subsidizing of his religious beliefs contrary to the purposes of Title VII and must inevitably give rise to a serious constitutional question under the establishment clause. Cf. *Estate of*

Thorton v. Caldor, Inc., — U.S. —, 105 S.Ct. 2914, 2918 (1985) (O'Connor, J., concurring).

B. The holding of the court of appeals that even if an employer has reasonably accommodated an employee's religious beliefs, the employer must nevertheless implement the accommodation the employee prefers unless the employer can demonstrate undue hardship, is not supported by the plain language of Title VII or its legislative history. Under Title VII's religious accommodation provisions, once an employer has proposed or implemented a reasonable accommodation, the statutory inquiry ends. The extent of undue hardship on an employer is considered under Title VII only where an employer has been unwilling or claims it is unable to accommodate reasonably an employee's religious beliefs. Cf. *Pinsker v. Joint District No. 28J*, supra; *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982).

Even if the school board is required to consider Philbrook's accommodation proposals, it is clear that either proposal would create undue hardship on the school board's business. In *Trans World Airlines v. Hardison*, supra, this Court stated that an accommodation proposal which requires an employer to incur more than a "*de minimis*" cost results in undue hardship to the employer. The potential costs to TWA in *Hardison* involved the payment of higher wages and a loss in business efficiency. Monetary costs similar to those which would have been incurred by TWA will be incurred by the school board if it is required to accommodate Philbrook in the manner he prefers. When these costs are coupled with the decrease in efficiency in the operation of the school system, which is already being incurred as a result of Philbrook's absences, it is clear

that undue hardship would result if either of Philbrook's proposals is implemented.

Implementation of Philbrook's proposals would also result in abrogation of the collective bargaining agreement covering the school board's teachers. The bargaining agreement, like predecessor agreements, limits teachers to three days paid leave for religious observance. These agreements also provide three days paid leave for "necessary personal business" but none of these days may be used for any of the reasons for which leave is otherwise provided in the bargaining agreement, including religious observance. If the school board is required to allow Philbrook to use his three days of necessary personal business leave for religious observance, the board will be required to depart from the collective bargaining agreement and, consequently, to forego its bargain with the union. In light of the strong national policy in favor of preserving the integrity of collective bargaining agreements, Title VII does not require an employer to abrogate an otherwise valid bargaining agreement absent a showing of an intent to discriminate. *Trans World Airlines v. Hardison*, 432 U.S. at 79. Cf. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

Requiring the school board to implement either of Philbrook's accommodation proposals would also result in his being compensated for additional days of absence because of religious needs while other teachers are denied a similar benefit for secular needs. The result would be to place a premium on Philbrook's religious beliefs in the allocation of paid leave contrary to the purpose of Title VII. Such preferential treatment would advance Philbrook's religion in violation of the establishment clause of the first amendment.

ARGUMENT

I. PHILBROOK HAS FAILED TO ESTABLISH A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII BASED UPON THE SCHOOL BOARD'S REFUSAL TO PROVIDE HIM WITH ADDITIONAL PAID LEAVE FOR RELIGIOUS OBSERVANCE.

Section 703(a)(1) of the Civil Rights Act of 1964, Title VII, 42 U.S.C. §2000e-2(a) makes it an unlawful employment practice for an employer to discriminate against an employee because of the employee's religion. The statute specifically prohibits discrimination with respect to compensation, terms, and privileges of employment, 42 U.S.C. §2000e-2(a)(1), and forbids an employer from limiting an employee "in a way which would deprive or tend to deprive that employee of employment opportunities or otherwise adversely affect his or her status as an employee" because of the employee's religion, 42 U.S.C. § 2000e-2(a)(2). If such discrimination in employment is found to exist, Title VII requires the employer to accommodate reasonably the employee's "religious observance or practice" unless to do so would result in "undue hardship on the conduct of the employer's business" 42 U.S.C. §2000e(j).

Before an employer may be called upon to attempt to accommodate an employee's religious beliefs, the employee must demonstrate that the employer's work requirements penalize him or her because of religion so as to constitute a violation of Title VII.³ Philbrook contends that the

³ While the standard of proof required to establish a *prima facie* case of religious discrimination under Title VII has not been

(Continued on following page)

school board's refusal to grant him paid leave to observe all of his religious holidays discriminates against him on the basis of religion in violation of Title VII.⁴ This claim is without merit because the school board's religious leave practices are facially neutral, do not unduly burden Philbrook in the practice of his religion and do not require him to forego employee benefits because of his religion. Under the standards articulated by this Court in cases involving the free exercise clause of the first amendment,

(Continued from previous page)

articulated by this Court, the courts of appeals have generally interpreted Title VII to require that a plaintiff prove the following elements: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she has informed the employer of this belief; (3) he or she was disciplined for failing to comply with the conflicting employment requirement. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2nd Cir. 1985), cert. granted, 106 S. Ct. 848 (1985) (App. to Pet. for Cert. at 9a); *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984) (court sustained district court's conclusion that employee had failed to establish *prima facie* case because unpaid leave for religious holidays was not disciplinary); *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984) (court concluded that discharge for failure to attend work on religious holiday amounted to discipline); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982) (employer conceded that employee's proof of discharge for failure to attend work on religious holiday established a *prima facie* case).

⁴ Philbrook's complaint implicates both Section 703(a)(1) and Section 703(a)(2) of Title VII. In *Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977), this Court noted that Section 703(a)(1) "appear[s] to be the proper section of Title VII under which to analyze questions of sick-leave or disability benefits." It is submitted that Section 703(a)(1) also appears to be the proper section under which to analyze questions involving other leave benefits. Because this Court has not stated whether a showing of intentional discrimination or disparate impact is required to prove a claim under either Section 703(a)(1) or Section 703(a)(2), *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 709, 710-11 n.20 (1978); the petitioners will analyze Philbrook's claim from both perspectives.

which are instructive in construing Title VII's ban on religious discrimination, and in *General Electric Company v. Gilbert*, 429 U.S. 125 (1977) and *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 709 (1978), which specifically dealt with discrimination within the context of Title VII, it is clear that no violation of that statute's ban on religious discrimination has occurred.

A. The school board's leave practices do not conflict with Philbrook's religious beliefs.

In *Thomas v. Review Board*, 450 U.S. 707 (1981), this Court held that a statute may offend the free exercise clause when the purpose or effect of the statute unduly burdens an individual in the practice of his religion. This holding is consistent with that in *Sherbert v. Verner*, 374 U.S. 398 (1963) where an individual was denied unemployment compensation benefits because she refused, as a matter of religious principle, to work on Saturday. This Court struck down the denial of benefits in *Sherbert* because the unemployment compensation scheme forced the applicant to choose "between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand", thereby penalizing the applicant in the exercise of first amendment rights. 374 U.S. at 404. While *Thomas* and *Sherbert* involved the free exercise clause rather than Title VII's prohibition against religious discrimination in employment, the test for establishing a *prima facie* case of a free exercise violation as articulated in those cases should be employed in determining whether impermissible discrimination has been shown under Title VII; both the application of free exer-

cise considerations within the employment context and Title VII's ban on religious discrimination in employment involve conflicts between individual religious practices and the receipt of an employment related benefit or opportunity.⁵

In light of *Thomas* and *Sherbert*, the school board's leave practices do not impose an undue burden on Philbrook's religious beliefs nor do they effectively penalize him in the practice of his religion by forcing him to choose between the precepts of his religion and benefits which would otherwise be available. Philbrook has not been required to choose between his religion and employment with the school board; in addition, he receives all benefits granted other teachers in the school system as well as an additional benefit, unpaid leave for religious observance. See, *Pinsker v. Joint District 28J*, 735 F.2d 388 (10th Cir. 1984), citing, *Braunfeld v. Brown*, 366 U.S. 599 (1961) (Sunday closing laws constitute permissible, incidental burden on religion.)

B. The school board's provision of three additional days of paid leave to all teachers for religious observances constitutes a significant accommodation to Philbrook's religious needs.

The mere fact that the leave provisions in the governing collective bargaining agreements distinguish between paid leave for "necessary personal business" and paid

⁵ See Note, *Religious Discrimination in the Work Place: A Comparison of Thomas v. Review Board and Title VII cases*, 33 Syracuse Law Review 843 (1982) (suggesting that courts should adopt a uniform approach to analyzing free exercise and Title VII cases which involve charges of religious discrimination in the work place).

leave for religious observance with a specific number of days allotted for both categories of leave does not render the provisions discriminatory. The employment policies of the school board are facially neutral and provide leave benefits to all teachers regardless of their religious beliefs to observe religious holidays and to pursue secular interests. The leave provisions also provide three days' paid leave to teachers regardless of their religious beliefs for necessary personal business reasons for which leave is not otherwise provided under the contract. Far from operating to deny Philbrook any employment benefit to which he would otherwise be entitled except for his religion, the school board's provision of three days paid leave to all teachers for religious observance constitutes a significant accommodation to both the secular and religious needs of the school board's teachers. Cf. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 78 (1975). While some disparity in treatment between employees is permissible when an employer seeks to accommodate reasonably an employee's religious beliefs, this Court has noted that Title VII does not contemplate preferential treatment. *Id.* at 81. In this regard, it is important to recall that Title VII's ban on religious discrimination was enacted to ensure that similarly situated employees are not treated differently solely because they differ with respect to religion. *Id.* at 71. In applying the statute, this Court has noted that "Title VII strives to achieve *equality of opportunity* by rooting out artificial, arbitrary and unnecessary employer

created barriers to professional development." *Connecticut v. Teal*, 457 U.S. 440, 451 (1982) (emphasis added). Thus, as the dissenting member of the panel in this case observed, the leave policy at issue does not violate Title VII because it does not make distinctions between employees, deny Philbrook employment opportunities, or adversely affect his employment status. *Philbrook v. Ansonia Board of Education*, 757 F.2d at 488 (App. to Pet. for Cert. at 22a) (Pollack, J., dissenting). The fact that the school board has further accommodated Philbrook by providing him leave without pay to observe religious holidays only serves to weaken his claim of discrimination.⁶

⁶ The court of appeals appears to have concluded that the Ansonia leave policies are "facially" discriminatory because they prohibit the use of necessary personal business leave for "any religious activity," thus "afford[ing] some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year." *Philbrook v. Ansonia Board of Education*, 757 F.2d at 483 (App. to Pet. for Cert. at 12a). This conclusion is objectionable for two reasons: first, there is no evidence in the record that the leave provisions were *designed* to prefer one religious group over another. And second, the court of appeals' view of the prohibition against the use of necessary personal leave for religious observance as facially discriminatory also overlooks the parity in the leave provisions which recognize both secular and religious needs. The leave provisions not only are facially neutral but also have the effect of preferring Philbrook in his religious needs over members of religious faiths which do not observe holy days on work days and non-adherents who do not observe any religious holidays. In addition, since days for religious observance are not charged against annual leave, the leave provisions operate to provide Philbrook 21 days of annual paid leave whereas teachers who do not need to be absent on work days to observe religious holidays only receive 18 days of paid leave each year.

C. Discrimination does not arise under Title VII merely because the school board's leave provisions are "less than all inclusive."

Philbrook claims that limiting paid leave for religious observance to three days has a discriminatory effect because while some teachers need no more than three days leave for this purpose, he needs more. However, that the bargaining agreement's provision for paid leave for religious observance does not satisfy those employees who desire more than three days paid religious leave does not mean that these provisions discriminate because of religion. All teachers, regardless of faith, are entitled to take three days paid leave to observe religious holidays and three days to attend to necessary personal business. Philbrook's need for additional absences does not destroy the presumed parity of leave benefits. It is true that, as applied to Philbrook, the school board's leave provisions are not all inclusive in the sense that Philbrook does not have all of the paid leave for religious observance he desires. However, discrimination on the basis of religion does not arise merely because the school board's leave provisions are "less than all inclusive." Cf. *General Electric Company v. Gilbert*, 429 U.S. 125, 138-139 (1977).

In *Gilbert*, the defendant employer provided non-occupational sickness and accident benefits to all employees, but did not allow the use of these benefits for disabilities arising from pregnancy. A class of female plaintiffs claimed that the exclusion constituted sex discrimination in violation of Title VII. This Court held that the plaintiffs had failed to establish a *prima facie* case of gender-based discrimination.

For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not *destroy the presumed parity of the benefits*, accruing to men and women alike, which results from the facially evenhanded inclusion of risks. To hold otherwise would endanger the common sense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risk impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than another.

Id. at 139-140 (emphasis added).⁷ A reading of Title VII's religious accommodation provisions which would require Philbrook to be provided all the paid leave he needs for religious observance would similarly endanger the common sense notion that an employer who has no paid leave program at all, but provides unpaid leave for religious observance, does not violate Title VII even though the "underinclusion" of risk impacts, as a result of an employee's religious beliefs, more heavily upon the adherents of one religion than those of another.

⁷ The court of appeals rejected the school board's reliance on *Gilbert*, claiming that this Court recognized in *Newport News Shipbuilding and Dry Dock Company v. EEOC*, 462 U.S. 669 (1983) that Congress, in enacting the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), not only overturned the holding of *Gilbert* but also rejected this Court's reasoning in that case on the issue of establishing a *prima facie* case of discrimination under Title VII. 757 F.2d at 483 (App. to Pet. for Cert. 12a). However, it is clear from a reading of *Newport News* as well as the legislative history behind the Pregnancy Discrimination Act, as set forth in the Court's opinion, that Congress only rejected this Court's determination of what constitutes sex discrimination under Title VII. 432 U.S. at 678-682. This Court's analysis of *Gilbert* of the elements of a *prima facie* case of discrimination under Title VII within the context of employment benefits continues to have viability, at least to the extent that gender-based discrimination is not in issue.

Philbrook has also failed to prove a *prima facie* case of discrimination in light of this Court's holding in *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702 (1978). In *Manhart*, this Court held that the employer's requirement that female employees contribute more to the employees' pension fund than male employees violated Title VII. The differential was held unlawful as a violation of Title VII because it would not have been required of female employees but for their sex.

An employment practice that requires 2,000 individuals to contribute more money into a fund than 10,000 other employees simply because each of them is a woman rather than a man, is in direct conflict with both the language and the policy of the Act. Such a practice does not pass the simple test of whether the evidence shows "treatment of a person in a manner which *but for* that person's sex would be different."

435 U.S. at 711 (footnote omitted, emphasis added).

Philbrook's claim of discrimination does not withstand scrutiny when the "but for" test of *Manhart* is applied. Philbrook has not shown that he would have been treated differently in the allocation of paid leave benefits but for his religious beliefs and therefore he has failed to establish a *prima facie* showing of a violation of Title VII. Not only has there been no discrimination in this case, but also Philbrook has received and continues to receive a benefit not available to other teachers, whatever unpaid leave he needs for religious observance beyond the three days of paid leave guaranteed under the bargaining agreement.

Philbrook contends that because the school board has allotted to employees a generous portion of paid leave, Title VII requires the board to be more generous and to

underwrite all of his absences arising for religious reasons. However, the failure to provide such a benefit does not support a charge of discrimination under Title VII. Cf. *Sherbert v. Verner*, 374 U.S. at 412 (Douglas, J., concurring) ("[t]he fact that government cannot exact from [an individual] a surrender of one iota of [his] religious scruples does not, of course, mean that [he] can demand of government a sum of money, the better to exercise them.") See also *Johnson v. Robison*, 415 U.S. 361, 385 (1974). Title VII should not be construed to require an employer to facilitate an employee's exercise of his religious beliefs by subsidizing those beliefs simply because the employer has chosen to subsidize other employee activities in a facially even-handed manner beneficial to every employee. A contrary holding would not only require the school board to subsidize Philbrook's religious practices but would also require an employer who provides no form of paid leave to compensate employees for absences taken to observe religious holidays. Such a construction of Title VII, which follows logically from the holding of the court of appeals in this case, must inevitably give rise to a serious constitutional question under the establishment clause. Cf. *Estate of Thornton v. Caldor, Inc.*, — U.S. —, 105 S.Ct. 2914 (1985) (O'Connor, J., concurring).

ARGUMENT

II. TITLE VII DOES NOT REQUIRE AN EMPLOYER TO ACCEPT AN EMPLOYEE'S PROPOSED ACCOMMODATION TO THE EMPLOYEE'S RELIGIOUS BELIEFS WHERE THE EMPLOYER HAS ALREADY MADE A REASONABLE ACCOMMODATION TO THOSE BELIEFS.

A. Once an employer has proposed a reasonable accommodation of the employee's religious practices, the statutory inquiry ends.

The court of appeals has stated that even if it is assumed that the Ansonia school board has reasonably accommodated Philbrook's religious beliefs by granting him paid and unpaid leave,⁸ it is nevertheless required by Title VII to accept the proposal Philbrook prefers unless to do so would result in undue hardship on the conduct of the school board's business. *Philbrook v. Ansonia Board of Education*, 757 F.2d at 484. (App. to Pet. for Cert. at 14a) Though consistent with current EEOC guidelines⁹, this

⁸ Providing Philbrook three days paid leave and additional unpaid leave for required absences due to religious beliefs exceeds the requirements of Title VII. In *Hardison*, this Court ruled that the collective bargaining agreement's seniority provisions appeared to "represent a significant accommodation to the needs, both religious and secular, of all of TWA's employees" 432 U.S. at 78. Presumably, the leave provisions in the school board's bargaining agreement similarly represent a significant accommodation to the religious and secular needs of all of the school board's teachers.

⁹ The court of appeals relied upon current EEOC guidelines in support of its conclusion that the duty to accommodate "cannot be defined without reference to undue hardship." 757 F.2d at 484. (App. to Pet. for Cert. at 14a) These guidelines are set forth at 29 C.F.R. § 1605.2(c)(2) and are reproduced at page viii

(Continued on following page)

reading of Title VII's religious accommodation requirement is at variance with the plain language of the statute.

Title VII requires an employer to accommodate reasonably an employee's religious beliefs unless to do so would result in undue hardship on the conduct of the employer's business. 42 U.S.C. § 2000e(j) Once an employer has either proposed or implemented a reasonable accommodation, the statutory inquiry ends. Neither the language nor the legislative history of Title VII supports the court of appeals' suggestion that an employer has not met its statutory burden by proposing or implementing a reasonable accommodation, but must, instead, accept the accommodation the employee prefers, absent a showing of undue hardship.¹⁰

(Continued from previous page)

of this brief. As this Court has noted, in enacting Title VII, Congress did not confer upon the EEOC authority to promulgate rules or regulations. Courts may, therefore, accord less weight to agency guidelines than to administrative regulations which Congress has given the force of law. *Trans World Airlines v. Hardison*, 432 U.S. at 76 n.11, *General Electric Co. v. Gilbert*, 429 U.S. at 141.

¹⁰ In examining the reasonable accommodation requirement, other courts of appeals have interpreted the provisions as requiring that an employee must try to accommodate his beliefs himself through existing mechanisms or request that the employer offer an accommodation. *Pinsker v. Joint District No. 28J*, 735 F.2d 388, 390-391 (10th Cir. 1984) (employer reasonably accommodated employee where it provided him unpaid leave for religious worship); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982) (employer met its burden where it demonstrated employee failed to use existing flexible scheduling system and failed to cooperate with employer efforts to reconcile a conflict); *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), cert. denied, 434 U.S. 1039 (1978) (employee waived right to have beliefs accommodated by employer where the

(Continued on following page)

The court of appeals' reading of Title VII is apparently based on the conclusion that the employer's duty to accommodate cannot be "defined without reference to undue hardship." 757 F.2d at 484 (App. to Pet. for Cert. at 14a) (See Footnote 9, *supra*). But under the plain language of the statute, the extent of undue hardship is considered under Title VII only where an employer has been unwilling or claims it is unable to accommodate reasonably an employee's religious beliefs. When the employer has proposed or implemented a reasonable accommodation in the first instance the statute does not require an employer to show undue hardship to justify a refusal to make an additional accommodation.

Even if Philbrook has established a *prima facie* case of religious discrimination, the school board has accommodated Philbrook's religious beliefs in a reasonable manner by granting him three days leave with pay and additional days without pay. This form of accommodation was found to be reasonable in *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984); *Rankins v. Commission on Professional Competence of Ducor*, 154 Cal. Rptr. 907, 593 P.2d 852 (1979); and in *California Teach-*

(Continued from previous page)

employee failed to use existing leave provisions and failed to cooperate with employer's conciliatory efforts). Compare, *American Postal Workers v. Postmaster General*, 781 F.2d 772 (9th Cir. 1985).

The Second Circuit erroneously concluded that the *Brener* court, by implication, approved the concept that Title VII requires an employer to accept an employee's proposal. The court misinterpreted *Brener* and failed to address the language in that opinion which specifies that an employee has a duty to attempt to accept the employer's proposal. *Brener v. Diagnostic Center Hospital*, 671 F.2d at 145, 146.

ers' Association v. Board of Trustees, 70 Cal. App. 3d 431, 138 Cal. Rptr. 817 (1977). Allowing Philbrook to take absences without pay does not hamper him in the exercise of his religious beliefs and fully discharges the school board's obligation to accommodate under Title VII.

B. Even if the school board is required to consider Philbrook's proposals, the implementation of those proposals would cause the school board undue hardship.

Even if the implementation of a reasonable accommodation to Philbrook's religious beliefs does not end the statutory inquiry as the court of appeals asserts, 757 F.2d at 484 (App. to Pet. for Cert. 14a-15a), it is clear that accepting either of Philbrook's accommodation proposals would cause the school board undue hardship.¹¹ In *Hardison*, this Court stated that an accommodation proposal which requires an employer to incur more than "*de minimis*" costs results in undue hardship to the employer. 432 U.S. at 84. Such potential "costs" to the employer in

¹¹ Similarly, if the analysis adopted by this Court in *Sherbert* and *Thomas* were applied to this case and if Philbrook had established a *prima facie* case under those decisions, the school board would be able to rebut his case by demonstrating that it has a compelling interest in maintaining its current leave policy. See, *Braunfeld v. Brown*, 366 U.S. 599 (1961) (plurality opinion) (Sunday closing law resulting in loss of one day's pay per week sustained because state had interest in maintaining a uniform day of rest). The Board's compelling interest in this case would be in promoting educational excellence. *Horton v. Meskill*, 172 Conn. 615 (1977) (local school boards have a duty to provide quality education); and in maintaining the integrity of its collective bargaining agreement, *Trans World Airlines v. Hardison*, 432 U.S. at 79 (collective bargaining resulting in enforceable agreements "lies at the core of our national labor policy . . .").

Hardison would have involved the payment of higher wages and a loss in business efficiency resulting in undue hardship. In the instant case, implementing either of Philbrook's suggested accommodations would result in undue hardship because the school board will incur more than a *de minimis* cost. Providing Philbrook with three days additional paid leave, the accommodation he prefers, would have cost the school board \$413 during the 1983-84 school year.¹² Even Philbrook's alternate proposal, three days paid leave with the cost of hiring a substitute deducted from his pay, would have cost the board \$338¹³ during that school year. Under the standards set forth in *Hardison*, these costs are clearly more than *de minimis*.¹⁴ It should also be noted that the school board would continue to incur costs in terms of a loss of school system efficiency should it be required to accommodate Philbrook in the manner he suggests. As the Superintendent of Schools testified, there are no qualified substitutes for business classes available; consequently, when Philbrook is absent from work, virtually no teaching takes place. (J.A. 57-59) The resulting loss of efficiency in terms of the educational

¹² During the 1983-84 school year Philbrooks' salary was \$24,810. (J.A. 102) Ansonia teachers were docked 1/180 of their annual salary for absences taken in excess of the paid leave days set forth in the collective bargaining agreement. (J.A. 101)

¹³ The cost of hiring a non-certified substitute during the 1983-84 school year was \$25 per day. (J.A. 124)

¹⁴ The cost to TWA of accommodating *Hardison* resulting from the payment of higher wages would have been \$150 for a three month period. 432 U.S. at 92 n.6 (Marshall, J., dissenting). The cost to the school board in order to implement either of Philbrook's accommodation proposals would be similar in financial terms and, when coupled with the loss of efficiency in terms of the educational process, would clearly constitute undue hardship.

process is apparent. That the school board now voluntarily incurs this particular cost by virtue of the accommodation already in place does not alter the fact that such a cost is a significant element of undue hardship.¹⁵ Under the Court's ruling in *Hardison*, an employer cannot be compelled to incur such a cost. Consequently, to require implementation of either of Philbrook's proposals would conflict with this Court's ruling in *Hardison* and effectively penalize the school board for efforts already made to accommodate Philbrook's religious practices.

Philbrook's accommodation proposals would also require the school board to abrogate its bargaining agreement with the Ansonia Federation of Teachers in order to provide him with the additional paid leave he desires. As this Court noted in *Hardison*, "collective bargaining aimed at effecting workable and enforceable agreements between management and labor lies at the core of our national labor policy" 432 U.S. at 79. The current bargaining agreement, as well as previous agreements, have limited teachers to three days paid leave for religious observance. (J.A. 71-101) The bargaining agreement also provides three days paid leave for "necessary personal business," but none of these days may be used for any of

¹⁵ The present case does not involve a conflict between religious beliefs and job requirements resulting in discharge from employment. However, if the school board had conditioned Philbrook's continued employment on meeting the attendance requirements imposed on other teachers, it is clear that it could have justified a decision to discharge him based upon the showing of undue hardship on the record in this case. Indeed, under its previous guidelines, the EEOC had determined that "undue hardship may exist where the employee's needed work cannot be performed by another employee of substantially similar qualifications during the period of his absence for sabbath observance." 29 C.F.R. § 1605.1 (1968).

the reasons for which leave is otherwise provided in the agreement, including religious observance. If the school board is required by Title VII to allow Philbrook to use these leave days for religious observance, it will be required to alter the terms of the bargaining agreement. While the record suggests that the union would have no objection to amending the bargaining agreement to accommodate Philbrook (J.A. 66), the school board has reason to object to such an amendment since it would thereby be required to forego the benefit of its bargain with the union. As this Court stated in *Hardison*, "neither a collective bargaining contract nor a seniority system may be employed to violate the statute [footnote omitted], but we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid agreement." 432 U.S. at 79. Cf. *Steelworkers v. Weber*, 443 U.S. 193 (1979).

C. Implementation of Philbrook's proposals would also lead to preferential treatment contrary to the intent and purpose of Title VII.

Requiring the school board to implement either of Philbrook's accommodation proposals, additional leave with full pay or additional paid leave less the cost of a substitute, would not only conflict with this Court's holding in *Hardison* on the question of undue hardship, but also result in preferential treatment contrary to the intent and purpose of Title VII. "The emphasis of both the language and the legislative history of the statute is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to race, color, religion, sex, or national origin." 432 U.S. at 71. Allowing Philbrook to

be compensated for additional days of absence because of religious needs when other teachers are denied such a benefit for secular needs would place a premium on Philbrook's religious beliefs in the allocation of paid leave. Such preferential treatment would contravene the very purpose of Title VII. In order to avoid impermissible preferential treatment while at the same time accommodating Philbrook in the manner he prefers, the school board would have to amend the bargaining agreement to allow all teachers to use their three personal days for not only religious observance, but also any "necessary" secular purpose in order to avoid a conflict with the establishment clause of the first amendment.¹⁶ The resulting increase in the availability of "necessary personal business leave" will likely lead to more teacher absences with a substantial increase in monetary cost to the school board and a decrease in the quality of education. Absent evidence that the leave provisions were intended to discriminate because of religion, this Court should not construe Title VII to require the school board to amend the agreement in order to accommodate Philbrook's religion, especially where to

¹⁶ The court of appeals expressed uncertainty about the "past and current scope of the personal leave provisions" of the bargaining agreement. 757 F.2d at 485 (App. to Pet. for Cert. at 16a). However, both the conduct of the parties and the specific terms of the bargaining agreement since 1970-71 make clear that paid personal leave has never been available to teachers beyond the three days specifically earmarked for religious observance in the bargaining agreement. One other teacher, an Orthodox Jew, has been docked for absences due to religious observance. (J.A. 54-55) Indeed, Philbrook, notwithstanding language in the decision of the court of appeals to the contrary, has been consistently docked for absences for religious observance beyond the three allowed by the various agreements. (J.A. 54)

do so would result in more than a *de minimis* cost to the employer.¹⁷ Cf. *Trans World Airlines v. Hardison*, 432 U.S. at 82.

Whether or not mandated by Title VII, the preferential treatment which would result from the implementation of either of Philbrook's proposals would also violate the establishment clause of the first amendment because such treatment would have the effect of advancing religion. Under the establishment clause, neither a state nor the federal government can "pass laws which aid one religion, aid all religions or prefer one religion over another." *Everson v. Board of Education*, 330 U.S. 1, 15 (1947). If the school board were to grant special employment preferences to Philbrook based on his religious beliefs it would be using the "machinery of the state" to advance his religion, *Abington School District v. Schemp*, 374 U.S. 203, 226 (1963), and the board's action would fail the three-prong test of constitutionality articulated by this Court in *Committee for Public Education and Religious Liberty v. Nyquist*, 413 U.S. 756 (1975). Under that test, legislation must: (1) reflect a clearly secular purpose; (2) have a primary effect that neither inhibits nor advances religion; and (3) avoid excessive governmental entanglement with religion. *Id.* at 773. It is clear that implementation of either of Philbrook's proposed accommodations, both of

¹⁷ While the school board has no present intention of altering the accommodation it has made to Philbrook, guaranteed unpaid leave for religious observance in addition to the paid leave provided under the bargaining agreement, such an accommodation may also be inconsistent with Title VII's purposes since other teachers are not guaranteed unpaid leave for secular reasons beyond the paid leave provided in the agreement. (J.A. 164)

which would guarantee him paid leave beyond that available for other teachers solely because of his religious beliefs, would require the school board to alter existing work rules regarding paid leave solely because of Philbrook's religious beliefs. Such action would advance Philbrook's religion in violation of the first amendment.

CONCLUSION

For the foregoing reasons, the petitioners respectfully submit that this Court should reverse the judgment of the court of appeals and remand with instructions that Philbrook's complaint be dismissed.

Respectfully submitted,

THOMAS N. SULLIVAN
646 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-2141

*Attorney for the Petitioners, Ansonia
Board of Education and Individual
School Board Defendants*

On the Brief:

Robert J. Murphy
Leslie A. Collins
Hartford, Connecticut

APPENDIX A

SUMMARY OF PHILBROOK ABSENCE RECORDS AND SALARY DATA¹

Year	Leave Entitlement Annual/Cumulative	No. of Days Absent	No. of Days Absent For Illness	No. of Days Absent for Personal Business	No. of Days Absent for Religious Reason	No. of Days Deducted For Religious Absences	Annual Salary	Per Diem	Amount Deducted From Annual Salary ²
1970-71	18/180	20	11	3	6	3		1/200	
1971-72	18/180	21	13	3	5	2	\$11,246.46	1/180	124.96
1972-73	18/180	18	11	2	5	2	12,922.50	1/180	143.58
1973-74	18/180	20	11	2	7	4	13,372.50	1/180	297.16
1974-75	18/180	23	12	0	10	7	15,582.08	1/180	605.97
1975-76	18/180	24	18	0	6	3	16,367.75	1/180	272.79
1976-77	18/180	21	18	0	3	0	17,261.67	1/180	0
1977-78	18/180	21	17	0	3	0	17,972.25	1/180	0
1978-79	18/180	22	18	0	3	0	18,506.67	1/180	0
1979-80	18/180	28	25	0	3	0	18,975.00	1/180	0
1980-81	18/180	21	18	0	3	0	19,475.00	1/180	0
1981-82	18/180	13	10	0	3	0	20,825.00	1/180	0
1982-83	18/180	13	5	0	3	0	22,720.00	1/180	0

(annual salary divided by per diem) x number of days = total deducted for salary religious absence deduction

¹Compiled from P.X. 14, P.X. 15, D.X. D, and J.A. 79-101.²The amount deducted from Philbrook's salary constitutes the amount deducted based on Philbrook's total annual salary. Because Philbrook's salary occasionally varied during the school year due to salary increases negotiated by the union, the amount actually deducted during the 1971-72 school year was \$106.26 and during the 1974-75 school year was \$580.37 (P.X. 15).

No. 85-495

5

Supreme Court, U.S.
FILED
MAR 31 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, ET AL,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**BRIEF OF RESPONDENT ANSONIA FEDERATION
OF TEACHERS IN SUPPORT OF PETITIONERS**

ROBERT F. McWEENY
SHERBACOW & McWEENY
638 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-9653

BEST AVAILABLE COPY

38pp.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED.....	ii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF THE CASE.....	1
SUMMARY OF ARGUMENT.....	2
ARGUMENT.....	4
1. The Second Circuit erred in its construction of Title VII of the Civil Rights Act of 1964, as amended, Section 701(j), 42 U.S.C. section 2000e(j) by requiring the employer and union to make more than a reasonable accommodation to the employee's religious practices.	
2. The Second Circuits construction of Title VII of the Civil Rights Act of 1964, as amended, Section 701(j), 42 U.S.C. section 2000e(j), is in conflict with the establishment clause of the First Amendment of the United States Constitution.	
CONCLUSION.....	26

QUESTIONS PRESENTED

1. Did the Court of Appeals err in interpreting Title VII of the Civil Rights Act of 1964, as amended, Section 701(j), 42 U.S.C. section 2000e(j) to require an employer who has reasonably accommodated the religious practices of an employee, to further accommodate such employee's religious practices by accepting any proposal of the employee which does not demonstrably result in undue hardship to the employer's conduct of his business?

2. Did the Court of Appeals err, after determining that the employer's accommodation of the employee's religious observance practices was reasonable accommodation, in inquiring whether there were other reasonable

accommodations of the employee's religious beliefs which would not create an undue hardship for the employer?

3. Did the Court of Appeals err in holding that a public school teacher established a prima facie case of religious discrimination under Title VII, where he was provided three days of leave with pay for religious observance and additional days of leave without pay for religious observance?

TABLE OF AUTHORITIES

Case	Page
<u>Brener v. Diagnostic Center Hospital, 671 F. 2d. 141 (5th Cir.1982)</u>	14,16,19
<u>Estate of Thornton v. Caldor, Inc. ____ U.S.____, 105 S.Ct. 2914 (1985)</u>	22,25
<u>Hardison v. Trans World Airlines, Inc., 527 F 2d 33 (1975)</u>	18,20
<u>Lemon v. Kurtzman, 403 U.S. 602 91 S. Ct. 2105 29 L. Ed. 745 (1971)</u>	22
<u>McDaniel v. Essex International, Inc. 571 F.2d 388, 341 (1978)</u>	12
<u>Philbrook v. Ansonia Board of Education, 757 F.2d 476 (2d Cir. 1985)</u>	9,10,11
<u>Pinsker v. Joint District Number 28J, 735 F.2d 388 (10th Cir.1984)</u>	9 10, 15
<u>Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)</u>	15,18,20,25

STATEMENT OF THE CASE

The respondent Union adopts by reference the statement of the case as set forth in petitioners' brief, and supports Petitioners' position.

SUMMARY OF ARGUMENT

The Union argues that the decision below is in error in that it construes the religious accommodation provision of Title VII to require more than reasonable accommodation.

The Second Circuit errs by misinterpreting the relationship between "reasonable accommodation" and "undue hardship". The Court found that the employer's reasonable accommodation was insufficient in that the employee's preferred accommodations might not impose "undue hardship" on the employer's conduct of its business.

Title VII prohibits employment discrimination on the basis of religion. In defining religion, Title

VII requires "reasonable accommodation" of an employee's religious practices. An employer or union which reasonably accommodates the employee's religious practices has met its obligation under Title VII. The statutory (Title VII 701(j) 42 U.S.C. section 2000e(j)) reference to undue hardship limits the reasonable accommodation obligation, it does not expand it.

An interpretation of Title VII which would require more than a "reasonable accommodation" would create an absolute right of accommodation in conflict with the establishment clause of the First Amendment. Such construction and result should be avoided as a matter of judicial policy.

ARGUMENT

1. THE SECOND CIRCUIT ERRED IN ITS CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000e(j), BY REQUIRING THE EMPLOYER AND UNION TO MAKE MORE THAN A REASONABLE ACCOMMODATION TO EMPLOYEE'S RELIGIOUS PRACTICES.

2. THE SECOND CIRCUIT'S CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000e(j), IS IN CONFLICT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION,

THE SECOND CIRCUIT ERRED IN ITS CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000e(j), BY REQUIRING THE EMPLOYER AND UNION TO MAKE MORE THAN A REASONABLE ACCOMMODATION TO EMPLOYEE'S RELIGIOUS PRACTICES.

The Second Circuit decision recognizes that the "...crucial issues of this case...involve interpreting the meaning of and relationship between the terms 'reasonable accommodation' and 'undue hardship'". (App. 13a) That is precisely the crucial issue before this court.

The terms "reasonable accommodation" and "undue hardship" have their origin in the definitional

section of Title VII of the Civil Rights Act of 1964, as amended, Section 701(j) /1. This definition references religion as it appears in Section 703(a), 42 U.S.C. section 2000e-2(a) as an individual factor upon which an employer may not discriminate. In effect Title VII thus prohibits an employer from discrimination against an employee because of his religious observance or practice; unless reasonable accommodation of such observance or practice would cause the employer's business undue hardship.

Unquestionably, the statute imposes a duty on an employer and/or

1/ Section 701(j), 42 U.S.C. section 2000e(j): The term "religion" includes all aspect of religious abservance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to am employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

union to reasonably accommodate the religious observance and practice of an employee. The issue before the Court is whether the statute requires any more than reasonable accommodation.

Clearly, the Second Circuit has found the employer and union have a greater obligation that the reasonable accommodation afforded Philbrook ("three days of paid leave and additional days of unpaid leave for religious observance...". App. 14a) This is specifically held in the opinion subject to this petition (App. 14a):

"We presume that Ansonia's leave policy is also 'reasonable'. And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that

the school board had satisfied its burden. The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called 'reasonable'. Where the employer and employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business."

The Second Circuit has thus negated the statutory "reasonable" modifier to the duty to accommodate, by requiring that the employer accept any employee proposed accommodation which

would not demonstrably cause undue hardship to the conduct of the employer's business.

The decision of the Second Circuit below conflicts directly with the Tenth Circuit decision in Pinsker v. Joint District number 28J, 735 F. 2d 388(10th Cir. 1984).

The Respondent-Plaintiff attempts to distinguish the cases on the basis of the use of two days of personal leave for religious observance in Pinsker, supra as opposed to the use of three days of religious leave for religious observance in Philbrook v. Ansonia, 757 F. 2d 476(2d Cir. 1985).

The distinction is meaningless as it affects the critical issues of a Title VII "prima facie" case of religious discrimination and the

construction of the reasonable accommodation provisions of Title VII.

In both Pinsker and Philbrook the Complainants, both public school teachers were given unpaid leave after exhaustion of respectively two and three days of paid leave for religious observance.

The Tenth Circuit specifically found at 735 F. 2d 391 that Pinsker had failed to make a prima facie showing of discrimination. The Second Circuit found on nearly identical legally operative facts that Philbrook had made a prima facie case of religious discrimination under Title VII (see Petition Appendix page 14a).

The conflict is further apparent in the Circuit's construction of the "reasonable accommodation" requirement

under Title VII. The Tenth Circuit specifically found in Pinsker, supra that a leave policy providing two days of paid leave for religious observance and additional days of unpaid leave constituted a reasonable accommodation. The Second Circuit in Philbrook (Appendix to Petition 14a) concluded:

"We presume that Ansonia's leave policy is also "reasonable."".

The Tenth Circuit construing the "reasonable accommodation" and "undue hardship" provisions of Title VII in the disjunctive held at 735 F. 2d 390:

"Simply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer."

This is precisely the

reconciliation of these terms "reasonable accommodation" and "undue hardship" which this Court should adopt. It is the only construction of the statute which will not create an absolute right of accommodation for religious observation or practice in conflict with the establishment clause of the First Amendment to the United States Constitution. It would also avoid litigation such as the instant case, involving tripartite conflict over what is essentially \$1,700 worth of damages over an eighteen year period.

The Sixth Circuit in McDaniel v. Essex International, Inc., 571 F. 2d 338 (1978) construed Title VII in this fashion. The Court held that once a

determination had been made that the employer had reasonably accommodated the employee's religious beliefs and practices, then it was not necessary to consider alternative accommodations and their "undue hardship" on the employer, 571 F 2d at 341. The issue of "undue hardship" should only be considered when the employer has been unable to reasonably accommodate the employee.

The construction of the "reasonable accommodation" and "undue hardship" provisions by the Second Circuit are articulated (Appendix page 14a) in its decision:

"We presume that Ansonia's leave policy is also "reasonable."

The Second Circuit's decision goes

on to note (Appendix 15a) that their analysis has never been previously articulated, but allege consistent interpretation citing Brener v. Diagnostic Center Hospital, 671 F. 2d 141 (5th Cir. 1982). (Though cited by the Second Circuit as supporting its construction of Title VII, the decision in Brener involved a termination case for failing to report on a day of religious observance. The unquestioned prima facie case in Brener required the Court to discuss whether reasonable accommodation was possible.)

The Fifth Circuit decision in Brener v. Diagnostic Center Hospital, 671 F. 2d 141 (1982) not only does not articulate the analysis of the Second Circuit, but suggests a construction

of the "reasonable accommodation" language of Title VII, entirely consistent with the decisions of the Tenth Circuit in Pinsker v. Joint District Number 28J, 735 F. 2d 388 (10th Cir. 1984) and the Sixth Circuit in McDaniel v. Essex International, Inc., 571 F. 2d 388, 341, (1978)

Consistent with its analysis, the Second Circuit went on to consider whether despite the employer's reasonable accommodation, the employee's proposal could be met without undue hardship on the employer. Despite this Court's clear articulation of "undue hardship" in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) the Second Circuit went on to find no undue hardship under

alternative accommodations proposed by the employee.

In Brener the Fifth Circuit held at 671 F. 2nd 146:

"Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer. A reasonable accommodation need not be on the employees' terms only."

The Court having concluded that Brener had established a prima facie case (he was terminated for refusing to show up for work on a religious holiday), considered whether the employer had "reasonably accommodated" his religious practices. In determining whether the

employer had attempted to reasonably accommodate Mr. Brener the Fifth Circuit considered the employee's proposed solutions; and found that they would have a detrimental impact on the the employer's business.

It is not apparent from such decision that the Fifth Circuit would have on the facts of the instant case (the only discipline alleged is the unpaid leave for the days not worked) gone beyond a finding of reasonable accommodation.

Contrary to the decision of the Fifth Circuit, logic and the Constitution the Second Circuit would require accommodation on the employees' terms only.

The only decision which is actually supportive of the Second

Circuit construction of "reasonable accommodation" and "undue hardship" is that of the Eighth Circuit in Hardison v. Trans World Airlines, Inc. 527 F2d 33 (1975), which decision was reversed by this Court for precisely that construction in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, (1977).

In its Trans World Airlines decision the Eighth Circuit at 527 F 2d, 41 states in footnote 10 that:

"...we are not concerned with whether TWA's posture with respect to such religious holdiays was a reasonable accommodation."

The application of the "reasonable accommodation" and "undue hardship" provisions of Title VII, involves an initial determination of whether the

employer has reasonably accommodated the employees' religious beliefs and practices. If the employer has reasonably accommodated such interests, the analysis goes no further. If the employer has been unable to reasonably accommodate the religious practices, the issue then becomes whether the proposed accommodations would impose undue hardship on the employer's business. The Second Circuit in its decision below, requires an employer, whether or not they have reasonably accommodated the employees' religious practices; to determine whether any of the employees' proposed accommodations would impose an undue hardship on the employer's business. The Fifth Circuit in Brener v. Diagnostic Center Hospital, supra, suggests that undue

hardship is the measure of whether the employer has reasonably accommodated its employees' religious practices. The Fifth Circuit contrary to the Second Circuit, finds a "correlative duty" of the employee to make a good faith attempt to satisfy his needs through a means offered by the employer.

The Tenth Circuit and Fifth Circuit decisions seem consistent with this Court's holding in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) wherein there was a discharge for refusal of the employee to report on a day in which he observed his religious practices. The District Court Decision in Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877 (W.D. MO 1974) ultimately upheld by this Court in Trans World Airlines,

Inc., supra, involved a finding that the employer had attempted reasonable accommodations, and that further accommodations would have worked an undue hardship.

In view of the apparent conflict between the Circuits it is necessary that this Court specifically address the issue of the application of the standards of "reasonable accommodation" and "undue hardship" under Title VII.

THE SECOND CIRCUIT'S CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000(e)(j), IS IN CONFLICT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court in its recent decision in Estate of Thornton v. Caldor, Inc.

U.S. , 105 S.Ct. 2914 (1985) reaffirms that a statute in order to pass constitutional muster under the establishment clause, must not only have secular purpose and not foster excessive entanglement of government with religion; but its primary effect must not advance religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). The

Connecticut Statute which created an absolute accommodation requirement with respect to "Sabbath" observance was found to have promoted or advanced religious practices.

In her concurring opinion Justice O'Connor (with whom Justice Marshall joined) noted at 105 S. Ct. 2919 in dicta that Title VII should stand constitutional muster under the establishment clause since it calls for a reasonable rather than absolute accommodation.

If the employer must not only reasonably accommodate the employee's religious practice; but go further and accept any proposal by the employee with respect to accommodation, unless the employer can establish that it

would cause "undue hardship" to its business; the advancement of religion is clearly at issue.

If the employer under Title VII is obligated to provide to employees additional benefits because of their religious practices (additional days leave, the right to work other than during the normal work week or work year) discrimination in the form of termination because of religious practices, or substantial interference with religious practices is not involved. What is at issue is a governmental requirement that facilitates religious practices and "advances" religion. This is clearly prohibited by the establishment clause.

This Court in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), noted specifically that to require an employer to honor the Sabbath days by incurring extra costs would constitute a "privilege...allocated according to religious beliefs", 432 U.S. at 84-85.

Privileges assigned by the state on the basis of religious belief are clearly inconsistent with the establishment clause, Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).

CONCLUSION

The respondent union and its individual officers advocate the construction of Title VII's religious accommodation sections in a manner which will be in conformity with the First Amendment, impose a comprehensible standard of reasonable accommodation, and avoid protracted tripartite litigation.

The decision of the Second Circuit should be reversed with judgment directed for the petitioners, the Ansonia Board of Education and its

individual members; and the Ansonia Federation of Teachers and its individual officers.

Respectfully Submitted,

Robert F. McWeeny
SHERBACOW & McWEENY
638 Prospect Avenue
Hartford Connecticut 06105

Attorney for Respondent
Ansonia Federation of
Teachers and Jose Neves,
Kathleen Roberts,
Mary Ghirardini,
Dennis Gleason,
Domonick Brogolia,
Maureen Wilkinson and
Georgette Williams

JUN 27 1985

JOSEPH F. SPANIOLO, JR.
CLERK

No. 85-495

In The
Supreme Court of the United States
October Term, 1985

ANSONIA BOARD OF EDUCATION, ET AL.,
Petitioners,
vs.

RONALD PHILBROOK, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT
RONALD PHILBROOK

DAVID N. ROSEN
400 Orange Street
New Haven, Connecticut 06511
(203) 787-3513
Counsel of Record
Of Counsel:
PAUL GEWIRTZ
127 Wall Street
New Haven, Connecticut 06520

QUESTIONS PRESENTED

1. Whether the Court of Appeals was correct to remand this Title VII case where the District Court had applied a plainly erroneous legal standard, conditioning relief on a showing by the employee that the discrimination alleged had threatened him with losing his job, and had made no findings which would support its judgment under a proper standard.

2. Whether an employer's rule which explicitly prohibits use of personal leave for "any religious observance" discriminates on the basis of religion in violation of Title VII.

3. Whether an employer who docks an employee's pay for absence due to religious requirements and then requires the employee to do substantial additional work for no pay has failed to reasonably accommodate religious observance as required by Title VII.

TABLE OF CONTENTS

	Pages
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	3
ARGUMENT:	
I. THE RULE THAT PERSONAL BUSINESS LEAVE MAY NOT BE USED FOR "ANY RELIGIOUS OBSERVANCE" DISCRIMINATES ON THE BASIS OF RELIGION IN VIOLATION OF TITLE VII.	7
A. The Personal Leave Provision Facially Discriminates on the Basis of Religion.	7
B. The Breadth and Function of the Personal Leave Provision Confirm That Exclusion of Religious Observance Is Discriminatory.	9
C. The Religious Leave Provision Does Not Eliminate or Excuse the Discrimination in Allowance of Personal Leave.	14
II. THE REQUIREMENT THAT PHILBROOK WORK WITHOUT PAY IN CONNECTION WITH DAYS HE IS ABSENT FOR RELIGIOUS OBSERVANCE TRIGGERS A DUTY OF REASONABLE ACCOMMODATION.	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES	Pages
<i>American Postal Workers Union v. Postmaster General</i> , 781 F.2d 772 (9th Cir. 1986)	25
<i>Arizona Governing Committee v. Norris</i> , 463 U.S. 1073 (1983)	22
<i>Bowen v. Roy</i> , — U.S. —, 54 L.W. 4603 (June 11, 1986)	20
<i>City of Cleburne v. Cleburne Living Center</i> , — U.S. —, 53 L.W. 5022 (July 1, 1985)	12
<i>Estate of Thornton v. Caldor</i> , — U.S. —, 53 L.W. 4853 (June 26, 1985)	20
<i>F.S. Royster Guano Co. v. Virginia</i> , 253 U.S. 412 (1920)	12
<i>Hishon v. King & Spalding</i> , 467 U.S. 69 (1984)	8
<i>Larson v. Valente</i> , 456 U.S. 228 (1982)	21, 23
<i>Los Angeles Department of Water and Power v. Manhart</i> , 435 U.S. 702 (1978)	22
<i>Michael M. v. Superior Court of Sonoma County</i> , 450 U.S. 464 (1981)	12
<i>Newport News Shipbuilding & Dry Dock Co. v. EEOC</i> , 462 U.S. 669 (1983)	21
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985)	2, 8, 10, 24
<i>Plyler v. Doe</i> , 457 U.S. 202 (1982)	12
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982)	4, 8, 14, 26
<i>Rostker v. Goldberg</i> , 453 U.S. 57 (1981)	12
<i>Shaw v. Delta Airlines</i> , 463 U.S. 85 (1983)	19
<i>Trans World Airlines v. Hardison</i> , 432 U.S. 63 (1977)	7, 25
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	10

TABLE OF AUTHORITIES—Continued

Pages

CONSTITUTION

First Amendment, Free Exercise Clause	2, 13
---	-------

STATUTES

Civil Rights Act of 1964, Title VII, as amended

42 U.S.C. Section 2000e(j)	7, 21
42 U.S.C. Section 2000e-2(a)(1)	8, 25
42 U.S.C. Section 2000e-2(e)	21
42 U.S.C. Section 2000e-2(h)	21, 22

REGULATIONS

EEOC Guidelines on Religious Discrimination:

29 C.F.R. Section 1605.2(c) (1980)	25
--	----

STATEMENT OF THE CASE

Plaintiff-respondent Ronald Philbrook has been a typing and business teacher at Ansonia, Connecticut High School since 1962. J.A. 17. In 1968 he was baptized a member of the Worldwide Church of God. J.A. 18. Among the teachings of this church is the requirement that on certain holy days each year members attend religious services and refrain from gainful employment. J.A. 18-21. The number of such holy days which fall on school days varies from year to year but is usually approximately six. J.A. 20.

The collective bargaining agreements between defendant-petitioner Ansonia Board of Education ("the Board") and defendant-respondent Ansonia Federation of Teachers have since 1967 provided three days paid leave for observance of religious holy days which church laws make obligatory. J.A. 71-101. The contracts have additionally provided three days paid leave for "necessary personal business," but since 1970 teachers have been prohibited from using this leave for "any religious activity" or "any religious observance." *Id.* The Board has treated Philbrook's absences for religious observance in excess of three per year as unauthorized and for each day of absence has docked his salary, the prescribed penalty for unauthorized absence. J.A. 54, 74, 76, 78, 81, 84, 87, 90, 93, 97, 101. When Philbrook is absent for religious observance, he prepares lesson plans in advance for his substitute to use and later verifies the classwork that has been done by correcting the classwork completed by his students in his absence. J.A. 67-70.

When the Board refused to make any accommodation to Philbrook's religious needs which would not result in

his absences being considered unauthorized and his pay being docked, Philbrook complained to both the EEOC and the Connecticut Commission on Human Rights and Opportunities. J.A. 43-45, 103-10, 115-23. Both agencies investigated, both found probable cause to believe the Board and union were discriminating against Philbrook on the basis of religion, and both attempted to conciliate. *Id.* Among the proposals made by the agencies—all of which were accepted by Philbrook and rejected by his employer—were: permitting Philbrook to use his personal leave days for religious observance; and permitting him to pay the cost of a substitute (which is considerably less than the amount of pay he is docked for attending religious services) and perform extra work to make up any time lost. *Id.*

Philbrook then sued in United States District Court, claiming violations of Title VII and the Free Exercise Clause. J.A. 3-8. The District Court found that Philbrook had not shown any actionable discrimination because he had not shown that he was put to the choice of violating his religious beliefs or “losing his job.” *Appendix to Petition for Certiorari* (“App.”) 37a. The United States Court of Appeals for the Second Circuit, without reaching the constitutional claim, noted that the basis of the District Court’s judgment was inconsistent with Title VII’s prohibition of discrimination “with respect to . . . compensation, terms, conditions, or privileges of employment . . . ” and accordingly reversed. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985).¹

¹ Because neither the court below nor petitioners here have addressed the Free Exercise Clause claim, respondent also does not do so. If the judgment below is reversed as to the statutory claim, it should be remanded for consideration of the Constitutional issue.

SUMMARY OF ARGUMENT

I.

The Ansonia Board of Education permits its employee schoolteachers three days annual paid leave for “necessary personal business,” but it prohibits them from using any of this leave for “any religious observance.” This prohibition is explicit facial discrimination on the basis of religion, in violation of Title VII. It is unlawful without reference to the additional duty of reasonable accommodation, which applies to claims of religious discrimination based upon the application to religious observers of facially neutral rules. Religious observers in Ansonia are explicitly prohibited from using their personal leave days to conduct their important and necessary personal business on the announced ground that their business is religious in nature.

The District Court made no relevant findings that could possibly justify this discriminatory treatment of religious observance. Instead, it concluded that proof of religious discrimination required a showing that an employee is at risk of “losing his job.” But Title VII clearly prohibits any discrimination with respect to “compensation, terms, conditions, or privileges of employment,” and that is precisely what is involved here. Because the judgment of the District Court relied on a plainly erroneous notion of the requirements for proving a claim of religious discrimination under Title VII and was unsupported by any relevant findings, the judgment of the Court of Appeals, remanding to the District Court for appropriate find-

ings, was plainly correct. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982).

In fact, the record compels the conclusion that the personal leave provision is unlawful facial discrimination under Title VII. Whether or not Ansonia is required to provide any personal leave at all, it may not, consistent with Title VII, allocate any of the components of the employment relationship, including personal business leave, on a discriminatory basis. Its personal leave provision is discriminatory on its face. This is sufficient in and of itself to make out a violation of Title VII. The leave provision for personal business needs is a general one, which would include religious needs were it not for the explicit exclusion of religious observance. The personal leave provision allows leave for purposes and activities so similar to religious observance in both function and content that the explicit exclusion of religious observance must be deemed discrimination against religious observance.

This facial discrimination is neither eliminated nor justified by the allotment of three days paid leave for religious observance. This is so for several reasons: First, the prohibition on using personal leave for *any* religious observance is more encompassing than the allocation of religious leave, which extends only to mandatory religious holidays. More fundamentally, the discrimination against religious observance in the personal leave provision sur-

vives the granting of some religious leave. Although the Board allows Philbrook to take a combined total of six days for religious and personal leave, it explicitly prohibits him from using three of those days for religious observance, on the ground that it is religious. In addition to this discrimination against religious observance, the leave provision also discriminates against certain religious observers: The Board's policies allow a teacher whose religious obligations demand only three days leave to fulfill those obligations completely and also to take additional leave for his most important remaining personal needs, solely because those remaining needs are secular; by comparison, Philbrook's remaining needs are unauthorized, and Philbrook is therefore disadvantaged, solely because those needs are religious in character.

Petitioners' various arguments that the exclusion of religious observance from personal leave is necessary to achieve "parity" and "balance" between religious and secular needs also fail. They are unsupported by any findings below; they ignore the fact that the exclusion of other limited secular categories from personal leave does not authorize exclusion of religion because religion, unlike those categories, is protected from discrimination by Title VII; and they ignore the lack of "parity" that remains. In the end, though, all the arguments about parity miss the critical point about Title VII: Title VII makes facial discrimination against religious observance illegal in and of itself without regard to possible defenses of reasonable-

ness. To attempt to determine whether one disadvantaging religious classification is "balanced" by other religious provisions is to misunderstand the statute's fundamental hostility to classifications, like the one here, that on their face disadvantage religious observance. Such classifications are plainly and simply unlawful discrimination.

II.

The Board's leave policy implicates the duty of reasonable accommodation as well. When Philbrook is docked a day's pay for being absent to fulfill his religious obligations, he is not simply receiving no pay for no work. On the contrary, the nature of his employment requires him to do substantial amounts of work in connection with each of these unpaid days. Each absence for religious observance therefore entails substantial work for no pay. This circumstance triggers Title VII's reasonable accommodation requirement and required the employer, and the District Court, to inquire whether reasonable accommodation—along the lines suggested by Philbrook, the EEOC, and the Connecticut Commission on Human Rights and Opportunities, or in some other fashion—was feasible without undue hardship. The failure of the District Court to make *any* such inquiry makes the judgment of the Court of Appeals remanding for appropriate findings plainly correct.

—o—

ARGUMENT

I. THE RULE THAT PERSONAL BUSINESS LEAVE MAY NOT BE USED FOR "ANY RELIGIOUS OBSERVANCE" DISCRIMINATES ON THE BASIS OF RELIGION IN VIOLATION OF TITLE VII.

A. The Personal Leave Provision Facially Discriminates on the Basis of Religion.

Ansonia public school teachers are entitled by contract to three days of paid annual leave for "necessary personal business," but they are prohibited from using any of these days for "any religious activity," or "any religious observance." J.A. 71-101. Because, under Title VII, "[t]he term 'religion' includes all aspects of religious observance and practice . . .," 42 U.S.C. Section 2000e(j), this prohibition on its face discriminates on the basis of religion. It is equivalent to an explicit prohibition against use of personal business leave by members of a religious faith or, for that matter, a racial group. This explicit, facial religious discrimination is unlawful without reference to the additional requirement of Title VII, *id.*, that employers in some instances adjust facially neutral rules in order to "accommodate" religious observance. See *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977).

The District Court's treatment of this claim was plainly insufficient and just as plainly required the judgment of the Court of Appeals reversing the District Court and remanding for further proceedings. The basis for the trial court's dismissal of Philbrook's claim was that since Philbrook was not "placed . . . in a position of violating his religion or *losing his job*," App. 37a (emphasis added),

he had not proved any discrimination. This is simply wrong as a matter of law: As the Court of Appeals noted, 757 F.2d at 482-83, this reasoning is inconsistent with Section 703(a)(1)'s prohibition of discrimination in "compensation, terms, conditions, or privileges of employment. . . ." 42 U.S.C. Section 2000e-2(a)(1). Title VII prohibits discrimination in the distribution of employment benefits, not simply in decisions to hire and fire. The District Court's approach would allow an employer to provide annual leave to everyone except Catholics or for every purpose except religious observance. Whatever the Board's obligation would be in the *absence* of a policy of providing personal leave days, Title VII prohibits it from *allocating* these personal leave days on a discriminatory basis:

A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free . . . not to provide the benefit at all. Those benefits that comprise the "incidents of employment," S.Rep. No. 867, 88th Cong., 2d Sess., 11 (1964), or that form "an aspect of the relationship between the employer and employees," . . . may not be afforded in a manner contrary to Title VII.

Hishon v. King & Spalding, 467 U.S. 69, 75-76 (1984) (footnotes and citation omitted).

The District Court's plain legal mistake in rejecting Philbrook's claim because he was not "placed . . . in the position of violating his religion or losing his job," App. 37a, is sufficient to justify the Court of Appeals' reversal of the District Court's judgment. This is the only issue this Court need decide in this case. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-92 (1982).

In addition to its plain legal error, the District Court made no other findings or conclusions to justify approval of the Board's facial religious classification or to support its judgment. If there is any basis for such approval, it was not found by the District Court, and the Court of Appeals was right to reverse on this basis also. *Id.*

In fact, no legally adequate justification for the Board's facial discrimination is possible, as review of the defenses petitioners raise will demonstrate. These defenses fall into two groups: the first is the contention that the personal leave provision standing alone does not raise a question of facial discrimination because it is a narrow category of special leave; the second are arguments that the leave provisions as a whole are non-discriminatory in view of the three days provided for religious leave. These two groups of defenses will be discussed in turn.

B. The Breadth and Function of the Personal Leave Provision Confirm That Exclusion of Religious Observance Is Discriminatory.

The Board and the AFL-CIO amicus suggest that the personal leave provision is not discriminatory because it is a narrowly defined category, similar to sick leave, which has nothing to do with religious observance. An employer can, they argue, give paid leave for specific, defined secular reasons without allowing that leave also to be used for religious observance. The difficulty with this argument is that it does not apply to this case: Philbrook does not seek an expansion of a "special purpose" leave to include his religious observance but simply elimination of the religiously discriminatory exclusion of religious observance from the broad general category of personal

leave. Through this category the Board has already recognized the importance of providing leave for a sufficiently wide range of "personal" reasons that the exclusion of personal reasons that are "religious" in nature must be viewed as discrimination. See *Widmar v. Vincent*, 454 U.S. 263 (1981).

To be sure, an employer who gives leave for a legitimate special purpose is entitled to test claims for use of that leave by whether they fit within that purpose. Thus an employee who sought to use sick leave to observe a religious holiday would be barred, not because his purpose was religious but because it was not for illness. On the other hand, an employer who gave paid leave (as the Board does) for attendance at weddings could not restrict use of this leave to non-religious wedding ceremonies without violating Title VII. In effect that is what the Board has done here. As the Court of Appeals noted, 757 F.2d 476, 485 & n.8, the district judge failed to make any findings regarding the scope of personal business leave, and certainly made no findings that would support the attempt to justify the Board's facial discrimination on the ground that the personal leave category is a narrow, special purpose one.

In fact, the category of "personal business" leave is a broad one that would clearly include religious observance but for the explicitly discriminatory exclusion. The very wording of the provision confirms this. The fact that religious observance is excluded from the definition of personal business shows that religious observance is prohibited because it is religious, not because it is outside the general category of necessary personal business. It

would serve little purpose for an employer to state that sick leave, for example, does not include observance of religious holy days, but without an explicit religious exclusion attendance at weddings would be expected to include attendance at religious weddings, and important and necessary personal business would be expected to include important and necessary religious business as well as secular business.² Nothing in the history of the administration of the personal leave provision suggests that it is narrower in application than it appears on its face.³

While the simple fact that the Board has explicitly restricted a benefit category on the basis of religion is sufficient to condemn the practice, see pp. 7-9, *supra*, the very fact that the personal leave category is a general one confirms that the exclusion is discriminatory. Because the

2 It is no answer to a claim of discrimination that since religious observance is excluded from personal leave by definition, personal leave is, by definition, inapplicable to religious observance. A discriminatory definition is unlawful: An employer could not define "weddings" to include only secular weddings or "religious holy days" to include only holy days described in the New Testament.

3 Until the 1978-79 school year personal business leave was "at the teacher's discretion . . ." J.A. 73-93. That is, while notice to the employer was necessary, its approval was not, see J.A. 52, 147 (required notice is simply claim for personal day, not description of planned activity), and the only limitations on the use of personal business leave were the exclusions on the face of the contract. J.A. 53. Since 1978, one personal business leave day has continued to be at the teacher's discretion, while the other two require approval. Petitioners introduced no evidence at trial, however, of any limitations on the use of even these personal business leave days other than those listed in the contract. J.A. 53 ("Q: How do you determine in a given case what constitutes necessary personal business? A [by the school superintendent]: Well, it would be business that is not listed in the contract.")

personal leave category is general, it includes a range of secular activities directly analogous to religious observance—sufficiently analogous that the exclusion of religious observance from the benefit category involves a favoring of secular activities over “similarly situated” religious ones, thereby violating the fundamental principle of non-discrimination that “like situations should be treated alike.”⁴ Consider the circumstance of religious teachers: For teachers who are religious observers, activities which are part of their “necessary personal business” may be part of their religious activity or observance. For such teachers, the prohibition on religious activity or observance is equivalent to a prohibition on their most important and necessary personal business—a discrimination against personal business that is religious in character.

For example, a teacher may require a personal business day for an important family meeting or function; for charity work; or to better him or herself through study. Nothing in the record suggests that any of these activities or purposes would be unauthorized uses of personal leave time. But for a religious teacher, any of these activities may constitute religious activity or observance. Activities which are permissible personal business for a non-religious teacher thus may become pro-

⁴ The principle that “similarly situated” or “like situations” should be “treated alike” has long been recognized by this Court as a fundamental principle of equality and non-discrimination. See, e.g., *City of Cleburne v. Cleburne Living Center*, — U.S. —, 53 L.W. 5022, 5023 (July 1, 1985); *Plyler v. Doe*, 457 U.S. 202, 216 (1982); *Rostker v. Goldberg*, 453 U.S. 57, 79 (1981); *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464, 469 (1981); *id.* at 477-79 (concurring opinion); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

hibited for the religious teacher solely because his motivation in conducting these activities is religious. Under Title VII, whether or not a sense of religious obligation motivates a given activity of an employee on his personal leave cannot legitimately be any of the employer’s business.

Just as the same activity may be either religious or secular depending on the motivation of the actor, so also mandated church attendance may serve many of the same functions in the life of a religious teacher that secular “necessary personal business” does in the life of secular employees. For a religious observer, mandated attendance at holy day services may be a more effective way to promote family understanding and unity than a secular counseling session, and provide better advice for conducting one’s affairs than a visit to a lawyer. In short, the distinction between religious observance or activity, including observance of religious holy days, and at least some forms of important and necessary secular business is simply a distinction based on religion: Religious observance is prohibited because it is religious, not because there is some other way in which the personal leave provision is inapplicable to religious observance.⁵ It is precisely this basis for unequal treatment which is prohibited by Title VII.

⁵ This is not to deny the distinctive character of religious observance, in particular the special compulsion that religious obligation exerts on the devout. Indeed our nation’s appreciation of the special significance and importance of religious observance, at least to the observer, is reflected in both Title VII and the Free Exercise Clause. But there is nothing about the unique characteristics of religious observance which justifies an employer selecting it for unfavorable treatment in the way the Board has here.

C. The Religious Leave Provision Does Not Eliminate or Excuse the Discrimination in Allowance of Personal Leave.

The Board argues that its discrimination in personal business leave is justified because the Board provides three days paid leave for observance of religious holidays and its leave policies, taken together, create a "parity" between the recognition of religious and secular needs. *Petitioners' Brief* 17, n.6. In making this argument, the Board is asking this Court to approve its apparently discriminatory personal leave policy without the benefit of any supporting findings by the trial court. Because the trial judge erroneously concluded that Title VII does not apply to employment discrimination short of discharge, it had no occasion to consider whether the apparent facial discrimination of the personal leave policy was justified by the religious leave allowance, and absent any such consideration, or supporting findings or conclusions, the Court of Appeals plainly could not affirm the District Court's judgment. *Pullman-Standard v. Swint*, 456 U.S. at 291-92. In fact, the religious leave provision does not cure the discrimination against use of personal leave for religious observance.

1. *The two provisions are not equivalent in scope.*

As a matter of fact, the separate religious leave permitted is not at all equivalent to the religious observance which is prohibited as personal leave. Paid leave is permitted only for some religious observance (holy days whose observance is mandatory under written denominational law), but it is prohibited as personal business leave for *all* religious observance.

2. *The discriminatory nature of the personal leave provision remains.*

Furthermore, a separate provision for some religious leave does not eliminate the basic discrimination created by the personal leave provision between religiously-based personal needs and secular personal needs. A person like Philbrook has religious needs that require more than the three days leave explicitly provided for religious needs. The combined effect of the three-day religious leave provision and the three-day personal leave provision allows Philbrook a total of six days of leave for religious and other personal needs, but bars him from using three of those days for religious observance. Having concluded that six days of paid leave for religious and other personal needs are acceptable, the Board may not forbid using three of those days for personal needs related to religious observance. To do so amounts to discrimination against religious observance.

The combined effect of the religious and personal leave provisions also disadvantages certain religious observers as compared to other religious observers. For illustration, compare Philbrook's situation to that of a Jewish teacher who takes advantage of the explicit provision for three days of religious leave and whose religious needs are fully met by taking two days leave for Rosh Hashanah and one for Yom Kippur.⁶ Thereafter, the teacher is free to use his personal leave days for his most pressing personal needs—including many personal

⁶ The evidence is that the leave provisions were consciously tailored to address the particular needs of this group of observers. J.A. 24.

needs closely analogous to religious ones, such as charitable works (provided they are engaged in for secular motivations and are not religious activities), other action compelled by conscientiously held ethical beliefs (provided these ethical beliefs are not religious), important family occasions (provided they are secular and not religious occasions), or educational study (provided it is not religious devotion).

On the other hand, after Philbrook uses up his three days for religious leave, Ansonia's personal leave policy does not allow him to use the remaining three days of personal leave for the personal business that is most important and pressing to him: religious activity and observance. Unlike the Jewish teacher, Philbrook is a member of a faith that requires more than three days away from work for religious observance. *His* important and necessary personal business, involving fulfilling his need to gain understanding of the world around him, to serve the highest interests of his community, and to provide guidance and stability for his family, are all served by performing his religious obligation and attending his church. Solely because these needs are fulfilled for him through religious observance rather than secular activity, he is prohibited from using his personal leave to meet them.

At bottom, the specious equality achieved by discriminating against religious observance in allowing personal business leave reflects an incomprehension of the role of religious observance in the life of devoutly religious people. Having used his three days for religious observance, Philbrook is prohibited from using his allotted personal business leave to conduct the necessary personal business that

is most important to his life, solely on the basis of religion. It is in the nature of an involved religious life that personal business is commonly religious in nature, and it is not equality but discrimination to provide teachers with differing religious needs equal opportunities to participate in necessary personal business only so long as that business is secular.⁷

Philbrook's objection to the Board's leave scheme is *not*, as petitioners try to suggest, that the "provision of three days paid leave for religious observance does not meet his need for religious leave while the needs of some of the school board's teachers are fully met." *Petitioners' Brief* 9. Philbrook is not arguing that an employer has some sort of affirmative duty to allow whatever number of days of paid leave a religious observer wants. The critical fact in this discrimination case is that the Board has itself already provided for personal leave days in addition to the three explicitly allowed for religious observance; however, it prohibits employees from using these *already provided* personal leave days for religious observance. The discrimination against religious observance involved in this case is that petitioners refuse to meet Philbrook's additional needs explicitly *because* those needs are religious, while agreeing to meet similar or analogous needs because they are *not* religious.

The Board simply has no interest in this facially discriminatory prohibition adequate to justify it, much less one which was found by the District Court. The costs to the Board in terms of pay to Philbrook and lost efficiency

⁷ Respondent has not taken a (secular) personal leave day since 1974. Pl. Ex. 18.

through use of a substitute are the same whether Philbrook's needs are secular or religious in nature. Having agreed to permit Philbrook leave for personal business with pay, the Board is not now in a position to complain about the costs that such leave will entail, since the costs for religiously motivated leave are the same as for secularly motivated leave. Petitioners argue that costs would increase because Philbrook, and perhaps others, would be more likely to take personal leave days if they were allowed on a non-discriminatory basis. The District Court, however, made absolutely no findings on this contention.⁸ But the more important point is that increased costs cannot justify a discriminatory rule. Denying leave to women workers or Black workers would also reduce costs, but it is the purpose of Title VII to prohibit savings from being extracted in a discriminatory fashion.

3. Petitioners' other "parity" arguments fail.

The Board suggests a number of other versions of the argument that its leave policies create "parity" between religious observance and secular personal needs.⁹ For

⁸ The costs involved are trivial. Few teachers use all the days of religious leave currently allowed, and religious absences account for far less than one percent of all absences. Pl. Ex. 18. And there is no evidence that anyone other than Philbrook and one other teacher, now retired, have ever sought to use more than three days for religious observance.

⁹ The Board also seeks to have this Court insulate it from liability because its discriminatory rule is part of a collective bargaining agreement. But the concerns of the *Hardison* court with the collectively bargained rights of co-employees, 432 U.S. at 79-83, are not at all implicated here. Elimination of discrimination against Philbrook would not entail any impingement on the

(Continued on following page)

example, it suggests that since personal leave is denied for some secular purposes, it must also be denied for religious observance. But the fundamental distinction between religious observance and the other activities the Board excludes from personal leave is that religious observance is protected by Title VII and the others are not. See *Shaw v. Delta Airlines*, 463 U.S. 85, 103 (1983) ("Title VII is neutral on the subject of all employment practices it does not prohibit").

Petitioners also argue that their discrimination with regard to personal business leave is necessary or permissible in order to offset what would otherwise be a religious "preference" in the religious leave provisions. *Petitioners' Brief* 30. Once again, this argument rests on the incorrect factual premise that the religious exclusion from personal leave is no greater in scope than the religious leave provision. More importantly, this attempt to portray the respects in which the leave provisions might create some "parity" between religious observance and secular leave altogether ignores the fundamental ways, discussed at length above, pp. 14-18, in which the leave provisions clearly create a discriminatory lack of parity between religious observance and secular activities: The Board allows em-

(Continued from previous page)

interests of his co-employees. He does not ask that he be given leave *instead* of a co-employee; when he is absent his work is performed by a substitute, not a reluctant fellow teacher. Indeed the union has sought to persuade the Board to eliminate the discrimination against Philbrook. J.A. 66. In these circumstances *Hardison* is relevant because of its affirmation that "... a collective bargaining agreement ... may [not] be employed to violate the statute ..." 432 U.S. at 79. In this connection it is noteworthy that neither the union nor the AFL-CIO amicus has suggested that the existence of the collective bargaining agreement provides any basis for reversal.

ployees six days for religious and other personal leave, but those people who need more than three days leave for *religious* purposes rather than *secular* purposes are not permitted to take their personal leave for their religious observance. That is not "parity" between religious observance and secular activities but facial discrimination against religious observance.¹⁰

In the end, though, the Board's cluster of arguments attempting to establish that its various religious-based classifications create "parity" are all fundamentally irrelevant. Where an employer extends an employment benefit in a way

10 This discriminatory "balancing" of the religious leave provision is certainly not required by either the Constitution or Title VII. As this Court and Congress have recognized, voluntary reasonable accommodation of the special needs of religious observers is neither establishment of religion nor religious discrimination under Title VII, and discrimination against religious observers cannot be justified on the ground that it is necessary in order to counteract such an accommodation. Whether or not required by the Constitution or Title VII, *cf. Estate of Thornton v. Caldor*, — U.S. —, —, 53 L.W. 4853, 4856 (June 26, 1985) (O'Connor, J., concurring), allowance of a few days of religious leave is certainly a *permissible* accommodation of religious differences in a pluralistic society. See *Bowen v. Roy*, — U.S. —, —, 54 L.W. 4603, 4608, n.19 (June 11, 1986) (plurality opinion). Religious leave days are particularly appropriate here in view of the complete accommodation of the religious needs of the majority by the school calendar's five day week and holidays on Christmas, Easter, and Good Friday.

In any event, any special accommodation involved in the religious leave provisions is not materially affected by discrimination in personal business leave. While the discrimination in personal business leave reduces the number of days employees make take for religion, it does not reduce the number of days religious employees have for purposes not available to secular employees. Discrimination in the personal leave provision serves only to penalize one or two teachers whose religious faith is outside Ansonia's mainstream, without affecting the general availability of religious leave.

that *facially disadvantages* religious observance, as the Board's personal leave provision does, under Title VII the courts should not accept an invitation to measure whether *other* employment benefits achieve "parity." Title VII represents a Congressional policy condemning classifications that on their face disadvantage religious observance, just as it condemns classifications that on their face disadvantage racial groups. Such classifications are suspect under the Constitution, see *Larson v. Valente*, 456 U.S. 228 (1982), and are presumptively unlawful under Title VII.¹¹ The inquiry is not whether they operate on balance, in conjunction with other employment benefits, to disadvantage some group of employees; such classifications are unlawful in themselves. See *Newport News Shipbuilding & Drydock Co. v. EEOC*, 462 U.S. 669, 685, n.26 (1983).¹²

11 Title VII contains no exception to liability for compelling justifications, much less for considerations of "reasonableness" or "parity." It permits only certain very narrowly defined defenses, such as where bona fide merit and seniority systems are involved, 42 U.S.C. Section 2000e-2(h), or where religion is a bona fide occupational qualification, 42 U.S.C. Section 2000(e)-2(e), none of which is applicable here.

12 Section 701(j) limits the inclusion of religious observance in its definition of religion by excepting situations where "an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . observance . . . without undue hardship on the conduct of the employer's business." 42 U.S.C. Section 2000e(j). This exception does not of course convert this case into the usual reasonable accommodation case, like *Hardison*, in which an employer is asked to make an exception to a neutral rule in order to accommodate the special religious needs of an employee. Here the only "accommodation" needed is elimination of a facially discriminatory distinction. Even assuming that permitting use of personal business leave for religious observance would entail more than de minimis costs for the Board, the definition's exception cannot be read to extend to cases of facial discrimination. A contrary reading would justify a leave policy permitting a given number of days off with pay per year and providing that all of those days could be used for any purpose whatever, except religious observance.

Comparison with *Los Angeles Department of Water and Power v. Manhart*, 435 U.S. 702 (1978), is especially instructive. In *Manhart*, this Court held that an employer violated Title VII when it withheld more money from female employees than from male employees for their pensions. The Court rejected arguments that this facial disadvantaging of female employees could be justified by the fact that females had a greater life expectancy and accordingly an expectation of receiving more pension benefits. Perhaps the employer's scheme would achieve some form of parity in the end, and perhaps in the pension context the explicitly sex-based classification served some rational purpose, but Title VII reflects Congress's firm view: Disadvantaging female employees by means of explicit classifications "based on sex" is presumptively impermissible.¹³ See also, *Arizona Governing Committee v. Norris*, 463 U.S. 1073, 1080-86 (1983) (plurality opinion). Title VII should not be construed in such a way that when employers discriminate against religious observers in one employment provision courts are then required to assess whether other provisions create "parity."

Title VII's rejection of classifications that disadvantage religion and religious observance—Title VII's refusal to allow case-by-case assessment of their reason-

¹³ The dissenters in *Manhart* relied for their position on the existence of a separate statute, commonly called the Bennett Amendment, 42 U.S.C. Section 2000e-2(h), that, they argued, allowed the sex-based classification there. No possibly exculpatory statute exists to insulate the Board from liability in this case. Indeed, the *Manhart* dissenters explicitly stated that "[t]his case, of course, has nothing to do with discrimination because of . . . religion. . . . The qualification the Bennett Amendment permitted . . . pertained only to claims of discrimination because of sex." 435 U.S. at 728, n.3.

ableness—is not an idiosyncratic policy, but one that reflects the long experience of many societies. That experience teaches us, and taught Congress, that classifications disadvantaging religious observance generally reflect unworthy motives, threaten religious liberty and are deeply divisive. That is why classifications based on religion are suspect under the Constitution, *Larson v. Valente*, 456 U.S. at 245-46, and why Congress forbade them under Title VII, without requiring case-by-case assessment of their supposed reasonableness. The District Court offered no justification for the Board's practice in this case and, under Title VII, no such justification exists.

II. THE REQUIREMENT THAT PHILBROOK WORK WITHOUT PAY IN CONNECTION WITH DAYS HE IS ABSENT FOR RELIGIOUS OBSERVANCE TRIGGERS A DUTY OF REASONABLE ACCOMMODATION.

Petitioners have characterized this case as raising broad questions about the scope of the duty of reasonable accommodation under Title VII. They have been free to do so because of the failure of the District Court to make any findings which would frame the accommodation questions actually at issue here. This failure makes the judgment of the Court of Appeals remanding for findings clearly correct. In fact, the accommodation question actually presented by this case—which is quite distinct from the facial discrimination question discussed in part I, above—is narrower and more straightforward than petitioners suggest and compels the conclusion that on the facts of this case the Board had a duty, which it did not fulfill, to seek reasonable accommodation of Philbrook's religious observance.

The dissenting judge below, joined by the Board and the amici here, view this case as applying the principle of "no work—no pay". See 757 F.2d 476, 488 (Pollack, J., dissenting). In this view, Title VII's reasonable accommodation requirement is not triggered by the loss of pay a religious employee suffers because he refrains from work for religious reasons, and Philbrook therefore has no complaint on account of being docked the equivalent of one day's salary for each day he is required to take unauthorized leave for religious observance. But whatever the merits of this view of the statute, it is simply not applicable to the facts of this case because Philbrook's job required him to perform a substantial amount of work in connection with each of the days for which his pay was docked. This case is therefore one of "substantial work-no pay," requiring inquiry into the feasibility of an accommodation to mitigate the burden of the Board's requirement that Philbrook work without pay in connection with his absence for religious observance.

The assumption that this is a no work-no pay case assimilates respondent's job as a school teacher to day labor, in which all the duties of the position are performed during working hours on the job site. In fact, Philbrook's work is not limited to attending his classes any more than a judge's work is limited to the hours court is in session. He performs a substantial amount of work in connection with the days he is absent for religious reasons. J.A. 68-70. His job has at least three parts: For every class he must first prepare the lesson plan; then teach the class; and finally review his students' classwork. On the days he is absent for religious holy days, he prepares the lesson plans for his classes and reviews them with his sub-

stitute. He then receives and corrects the assignments his students have completed in his absence. *Id.* Although his pay is docked, he is still required to perform a substantial fraction of the duties for which his pay was intended to compensate him.

Having to do work for no pay plainly disadvantages Philbrook "with respect to compensation, terms, conditions or privileges of employment." 42 U.S.C. Section 2000e-2(a). Accordingly, this case squarely presents the question of whether any reasonable accommodation was feasible under *Trans World Airlines v. Hardison* to mitigate Philbrook's loss of pay.¹⁴ The issue of who gets to choose which of two or more accommodations is adopted, both of which eliminate the penalty on an employee for exercising his religion, however, is *not* presented by this case because the Board has not implemented or proposed any accommodation which would mitigate Philbrook's injury—having to work for nothing in connection with absence for religious observance.

¹⁴ This is a case, envisaged by the Ninth Circuit in *American Postal Workers Union v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986), in which, assuming the Board made efforts to accommodate Philbrook's religious practice, Philbrook still has a conflict between his religious practice and what the Ninth Circuit termed his "employment status," i.e., his compensation, terms, conditions, or privileges of employment. 781 F.2d at 776. As the Ninth Circuit explained, only accommodation which eliminates all the burdens on "employment status" relieves the employer from the requirement to consider alternative accommodations short of undue hardship. 781 F.2d 776-77. See also, 29 C.F.R. Section 1605.2(c) (1980) ("Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions or privileges of employment.") Where as here disadvantage in compensation and terms and conditions of employment continues to burden religious exercise, the employer is not relieved of its duty to make reasonable accommodation.

Because the District Judge did not consider either whether having to work for no pay burdened Philbrook's religious practice or whether any accommodation was feasible short of undue hardship under *Hardison*, the Court of Appeals was correct to remand. *Pullman-Standard v. Swint*, 456 U.S. at 291-92.

On the present record, no reason appears why either permitting the use of personal leave for religious observance or docking Philbrook only the cost of a substitute, not his entire salary, and permitting him to make up lost time on other assignments, would not be reasonable accommodations free of undue hardship to the Board. Evidence that Philbrook's absence might result in lost efficiency in the classroom is beside the point on the accommodation question actually presented by this case. The Board agrees Philbrook may be absent; the only question is whether it may burden that absence with unpaid work, and it is this obligation to perform unpaid work, not the absence itself, which the Board must accommodate short of undue hardship. The Board has suggested that paying Philbrook anything more than he now receives would involve more than the de minimis costs contemplated by this Court in *Hardison*. But these costs are not additional expenditures for the Board; they are simply a reduction in the amount of money the Board would save under the current regime by docking Philbrook's salary. Additionally, it is reasonable to impose these costs on the Board since they actually represent in whole or principal part simply compensation for Philbrook's work as a teacher in connection with the days he is absent for religious observance.

Finally, because the prohibition on use of personal leave for religious observance is discriminatory and illegal

and serves no valid purpose of the Board, its elimination is also a reasonable accommodation of Philbrook's observance. No reason has been suggested why permitting this use of personal leave would be an undue hardship for the Board, and accordingly the Court of Appeals was right to direct the District Court to consider this accommodation as well.

CONCLUSION

Accordingly, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

DAVID N. ROSEN
400 Orange Street
New Haven, Connecticut 06511
(203) 787-3513
Counsel of Record

Of Counsel:
PAUL GEWIRTZ
127 Wall Street
New Haven, Connecticut 06520

June 27, 1986.

15
No. 85-495

Supreme Court, U.S.

FILED

OCT 4 1986

JOSEPH E. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States

October Term, 1985

— o —
ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,
vs.

RONALD PHILBROOK, *et al.*,
Respondents.

— o —
**ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

— o —
REPLY BRIEF FOR THE PETITIONERS

— o —
THOMAS N. SULLIVAN
646 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-2141
*Counsel of Record
for Petitioners*

On the Brief:

ROBERT J. MURPHY
LESLIE A. COLLINS
646 Prospect Avenue
Hartford, Connecticut 06105

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
I. Because the leave provisions on their face treat employees' religious and secular claims for paid leave in an equal manner and Philbrook has not shown that they have been applied in a discriminatory fashion, Philbrook has not established a <i>prima facie</i> case of disparate treatment on the basis of religion.	1
A. The leave provisions are facially neutral.	1
B. Philbrook has not shown that the leave provisions have been applied in a discriminatory manner.	3
II. Philbrook has not established that a conflict exists between the job attendance requirements and his need to be absent from work or that he has suffered a deprivation as a result of the school board's leave policies.	5
Conclusion	7

TABLE OF AUTHORITIES

CASES:	Page
<i>American Propeller & Mfg. Co. v. United States</i> , 300 U.S. 475 (1937)	4
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	2
<i>Mastro Plastics Corp. v. National Labor Relations Board</i> , 350 U.S. 270 (1956)	2
<i>Meritor Savings Bank, FSB v. Vinson</i> , — U.S. —, 106 S.Ct. 2399 (1986)	6
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985), <i>cert. granted</i> , 106 S.Ct. 848 (1985) (App. to Pet. for Cert. at 9a)	2, 5
<i>Poe v. Ullman</i> , 367 U.S. 497 (1961)	3
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273 (1982)	1, 4
<i>Transportation-Communication Employees Union v. Union Pacific Railroad Co.</i> , 385 U.S. 157 (1966)	2

ARGUMENT

I. BECAUSE THE LEAVE PROVISIONS ON THEIR FACE TREAT EMPLOYEES' RELIGIOUS AND SECULAR CLAIMS FOR PAID LEAVE IN AN EQUAL MANNER AND PHILBROOK HAS NOT SHOWN THAT THEY HAVE BEEN APPLIED IN A DISCRIMINATORY FASHION, PHILBROOK HAS NOT ESTABLISHED A PRIMA FACIE CASE OF DISPARATE TREATMENT ON THE BASIS OF RELIGION.

Philbrook argues that the leave provisions of the collective bargaining agreement facially discriminate on the basis of religion in violation of Title VII and that the Court need only decide whether the court of appeals was correct in reversing the district court's judgment and remanding the case to that court for appropriate findings. In support of his claim, Philbrook notes that while the leave provisions provide three days of paid leave to observe mandatory religious holidays, the provisions which afford three days of paid leave to attend to necessary personal business discriminatorily prohibit use of such leave for "any religious observance." The record, however, permits only the conclusion that the leave provisions, as applied to Philbrook, are facially neutral; therefore, remand of this case to the district court is inappropriate under *Pullman-Standard v. Swint*, 456 U.S. 273, 301 (1982).

A. The leave provisions are facially neutral.

The leave provisions, when construed as a whole, treat employees' religious and secular claims for paid leave in

an equal manner.¹ In this connection, the thrust of the restrictions on the use of necessary personal leave is to disallow the taking of such leave for reasons for which paid leave is provided under other provisions of the agreement, and thus to prohibit necessary personal leave from being interchangeable with other forms of paid leave. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 488 (2d Cir. 1985) (Pollack, D.J., dissenting), *cert. granted*, 106 S.Ct. 848 (1985) (App. to Pet. for Cert. at 22a). Philbrook suggests that the personal leave provisions foreclose use of necessary personal leave for any activity which contains a religious component. See *Brief for Respondent* at 15-16. But the leave provisions do not expressly foreclose activities that have such a component; further, Philbrook has produced no evidence that there are any such activities which would not fall within the personal leave provisions.

¹It has been recognized by this Court that the terms of a collective bargaining agreement must be construed, not in isolation from other provisions, but as a whole in light of practice, usage and custom to effectuate the intent of the parties. *Transportation-Communication Employees Union v. Union Pacific Railroad Co.*, 385 U.S. 157 (1966); *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270 (1956). And such a construction in this case is not tantamount to an assertion of a "bottom line" defense rejected by this Court in *Connecticut v. Teal*, 457 U.S. 440 (1982). In *Teal*, this Court held that the overall employment policies which favored minorities could not defeat the claims of individual members of a protected class. In the present case, the leave provisions protect both the individual religious employees and religious employees as a group. Although Philbrook and certain amici suggest that Jewish teachers are given preferential treatment because they have all the time off they need for religious holidays, there is no evidence in the record to support this suggestion. Indeed, the record indicates that at least one Jewish teacher was required to take unpaid leave beyond that available in the collective bargaining agreement in order to have all the time off she needed for religious observance. (J.A. 54-55)

For example, the necessary personal leave provisions on their face treat equally a teacher who requests leave for crisis counseling performed by a minister and a teacher who requests leave for such counseling performed by a therapist. The leave in either case could be characterized as being for necessary personal business. Philbrook, therefore, has no more of a right under Title VII to be relieved of the restrictions imposed on the use of personal leave than another employee has the right to use for secular purposes three days of paid leave otherwise afforded for the observance of holy days. To conclude otherwise would lead to preferential treatment on the basis of religion.

B. Philbrook has not shown that the leave provisions have been applied in a discriminatory manner.

Even if Philbrook's claim that the prohibition against the use of necessary personal business leave for "any religious observance" constitutes facial discrimination is accurate, Philbrook has the burden of proving that the agreement *as applied* discriminates against him, a burden which he has failed to meet. This is the case because a collective bargaining agreement which in the abstract discriminates against classes protected under Title VII, but *as applied* does not result in discriminatory treatment, presents no justiciable case or controversy under Article III of the United States Constitution. Cf. *Poe v. Ullman*, 367 U.S. 497, 504-5 (1961) (plurality opinion). In this connection, there is *no* evidence in the record that Philbrook sought to use necessary personal business leave for re-

ligious observance other than for the observance of mandatory religious holidays.²

Philbrook implies impermissible motive based upon a claim that the religious leave provisions favor Jewish teachers and upon the prohibition in the necessary personal leave provisions against the use of such leave for "any religious observance." However, in determining impermissible motive, the Court should consider the alternatives available to the school board in providing paid leave for religious observance. The parties to the collective bargaining agreement could have negotiated a leave provision which does not differentiate between secular and religious needs of employees by granting three days of paid leave to attend to necessary personal business without restriction. Such a provision would insulate the school board from Philbrook's claim of illicit, facial discrimination. However, under such a "neutral" leave provision, Philbrook would receive fewer days of paid leave than he presently receives under the "facially discriminatory" provision contained in the governing collective bargaining

²Amici, the United States and Equal Employment Opportunity Commission, contend that the necessary personal business leave provisions might be discriminatory if they are applied broadly and such leave is permitted for any non-religious reason. Philbrook, however, has failed to establish such broad application; in fact, petitioners have established on the record that the leave provisions at issue are narrow in scope and strictly enforced. (J.A. 51-54, 61, 64-65, 145-146) Philbrook had the opportunity to present contrary evidence, but has failed to do so. He should not be given a second opportunity to litigate this issue. Cf. *American Propeller & Mfg. Co. v. United States*, 300 U.S. 475 (1937). Additionally, under the *Pullman* case, remand is improper because the record permits only one resolution of the factual issue concerning application of the personal business leave provisions.

agreement. And even if such a "neutral" provision were adopted, Philbrook could still argue that he has been discriminated against because he would be forced to use personal leave for religious reasons while other employees who already had time to observe the traditional holidays would be free to use all personal leave for secular business.

II. PHILBROOK HAS NOT ESTABLISHED THAT A CONFLICT EXISTS BETWEEN THE JOB ATTENDANCE REQUIREMENTS AND HIS NEED TO BE ABSENT FROM WORK OR THAT HE HAS SUFFERED A DEPRIVATION AS A RESULT OF THE SCHOOL BOARD'S LEAVE POLICIES.

While the respondent bases his case on a claim of facial discrimination, some of the amici, instead, focus on whether a *prima facie* case has been established. It is the position of the petitioners that the court of appeals should have affirmed the district court's ruling that Philbrook failed to establish a *prima facie* case of religious discrimination in the school board's refusal to grant him more than three days paid leave to observe religious holidays occurring during the work year. This is the case because Philbrook failed to meet the first and third prongs of the three-prong test applied by the court of appeals in determining whether Philbrook was subject to religious discrimination.³

³The court of appeals interpreted Title VII to require that Philbrook prove the following elements: (1) he has a bona fide religious belief that conflicts with an employment requirement; (2) he has informed the employer of this belief; and (3) he was disciplined for failing to comply with the conflicting employment requirement. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2d Cir. 1985), cert. granted, 106 S.Ct. 848 (1985) (App. to Pet. for Cert. at 9a).

With regard to the first prong, Philbrook has not shown that a conflict exists between the job attendance requirements and his need to be absent from work to observe holy days. No conflict between the job attendance requirements and Philbrook's religious practices has arisen because the job attendance requirements have been waived in that Philbrook has been granted three days of paid leave and an unlimited number of days of unpaid leave to observe holy days.⁴

With regard to the third prong, Philbrook has failed to show that he has suffered a "deprivation" for failing to comply with the job attendance requirements. Philbrook has not suffered a deprivation in any sense of the word; rather, he has been denied a day's pay for a day not worked, a result uniformly applied to all Ansonia teachers who take more days of leave than are afforded under the governing collective bargaining agreement.⁵

— 0 —

⁴In the 1974-75 school year Philbrook was granted three days of paid leave and seven days of unpaid leave. (P.X. 14)

⁵It should be noted that the petitioners are not arguing that because Philbrook has not been discharged, Title VII is inapplicable. Employment discrimination cases decided by this Court make it clear that Title VII is not only concerned with discrimination resulting in discharge, but also with deprivations effecting "terms, conditions, or privileges of employment." See, *Meritor Savings Bank, FSB v. Vinson*, — U.S. —, 106 S.Ct. 2399 (1986).

CONCLUSION

For the foregoing reasons and for the reasons set forth in their initial brief, the petitioners respectfully submit that this Court should reverse the judgment of the court of appeals and remand this case with instructions that Philbrook's complaint be dismissed.

Respectfully submitted,

THOMAS N. SULLIVAN
646 Prospect Avenue
Hartford, Connecticut 06105
(203) 233-2141

*Attorney for the Petitioners, Ansonia
Board of Education and Individual
School Board Defendants*

On the Brief:

ROBERT J. MURPHY
LESLIE A. COLLINS
646 Prospect Avenue
Hartford, Connecticut 06105

In the Supreme Court of the United States

JOSEPH F. SPANIOL, JR.,
CLERK

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, ET AL., PETITIONERS

v.

RONALD PHILBROOK, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

**BRIEF FOR THE UNITED STATES AND THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION AS
AMICI CURIAE SUPPORTING AFFIRMANCE**

CHARLES FRIED

Solicitor General

WM. BRADFORD REYNOLDS

RICHARD K. WILLARD

Assistant Attorneys General

CAROLYN B. KUHL

Deputy Solicitor General

MICHAEL CARVIN

Deputy Assistant Attorney General

RICHARD J. LAZARUS

Assistant to the Solicitor General

BRIAN K. LANDSBERG

HAROLD J. KRENT

LOUISE A. LERNER

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 633-2217

JOHNNY J. BUTLER

General Counsel (Acting)

Equal Employment Opportunity

Commission

Washington, D.C. 20507

37122

QUESTION PRESENTED

Whether Title VII of the Civil Rights Act of 1964 requires a school board and teachers' union to accommodate further a teacher whose religious beliefs require that he miss approximately six days of work per year when the current union contract provides for three days of paid leave for mandatory religious observance and prohibits the use for religious observance of three days of paid leave provided by the contract for "necessary personal business" and when the school board allows additional days of unpaid leave for mandatory religious observance.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	8
Argument:	
An employer reasonably accommodates the religious beliefs of an employee within the meaning of Title VII of the Civil Rights Act by offering the employee a combination of paid and unpaid leave for mandatory religious observance unless the employer's paid leave policy discriminates against religious activities	11
A. An employer complies with Title VII when it reasonably accommodates the religious beliefs of an employee by eliminating any conflict between those beliefs and employment requirements while reasonably preserving the employee's employment status	12
B. The school board policy of providing an employee with paid and unpaid leave for mandatory religious observance is reasonable as a matter of law unless the school board's paid leave policy discriminates against religion.....	18
C. Accommodation of Philbrook's religious beliefs neither offends Title VII nor implicates the Establishment Clause	25
Conclusion	29

TABLE OF AUTHORITIES

Cases:	Page
<i>Alexander v. Choate</i> , No. 83-727 (Jan. 9, 1985)	21
<i>American Postal Workers Union v. Postmaster General</i> , 781 F.2d 772	15, 17, 18
<i>Bowen v. Roy</i> , No. 84-780 (June 11, 1986)	11, 15, 17, 28
<i>Brener v. Diagnostic Center Hospital</i> , 671 F.2d 141	18
<i>Dewey v. Reynolds Metals Co.</i> , 402 U.S. 689	2
<i>Estate of Thornton v. Caldor, Inc.</i> , No. 83-1158 (June 26, 1985)	16, 27-28
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567	16
<i>Monroe v. Standard Oil Co.</i> , 452 U.S. 549	19, 20
<i>Nashville Gas Co. v. Satty</i> , 434 U.S. 136	19
<i>Parker Seal Co. v. Cummins</i> , 429 U.S. 65, vacated and remanded, 433 U.S. 903	2
<i>Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe</i> , 735 F.2d 388	19, 20
<i>Pullman-Standard v. Swint</i> , 456 U.S. 273	23
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63	2, 8, 13, 14, 21, 26, 27, 28
<i>United Steelworkers v. Weber</i> , 443 U.S. 193	16
<i>Walz v. Tax Comm'n</i> , 397 U.S. 664	28
<i>Whirlpool Corp. v. Marshall</i> , 445 U.S. 1	20
<i>Wisconsin v. Yoder</i> , 406 U.S. 205	28

Constitution, statutes and regulations:

U.S. Const.:

Amend. I	6
Establishment Clause	8, 10, 12, 26, 27, 28
Free Exercise Clause	6, 15, 28

Civil Rights Act of 1964:

Tit. II, 42 U.S.C. 2000a <i>et seq.</i>	2
Tit. III, 42 U.S.C. 2000b <i>et seq.</i>	2
Tit. IV, 42 U.S.C. 2000c-6	2
Tit. VII, 42 U.S.C. 2000e <i>et seq.</i>	1, 2
42 U.S.C. 2000e(j)	2, 8, 13, 15
42 U.S.C. 2000e-2(a)	2
42 U.S.C. 2000e-2(a)(1)	14

Constitution, statutes and regulations—Continued: Page

42 U.S.C. 2000e-2(a)(2)	14
42 U.S.C. 2000e-5(a)	1
42 U.S.C. 2000e-5(f)(1)	1
42 U.S.C. 2000e-16	2, 25
Rehabilitation Act of 1973, § 504, 29 U.S.C. 794	21
Pub. L. No. 88-352, § 703, 78 Stat. 255	12
Pub. L. No. 92-261, § 2(7), 86 Stat. 103	12
5 U.S.C. 5550a	2, 24
18 U.S.C. 245	2
42 U.S.C. 3601 <i>et seq.</i>	2
5 C.F.R. 550.1002(b)	25
29 C.F.R.:	
Section 1605.2(c)(2)(ii)	17
Section 1605.2(d)	16, 20, 21
Section 1605.2(d)(1)(i)	19

Miscellaneous:

118 Cong. Rec. 706 (1972)	17
124 Cong. Rec. (1978):	
p. 15435	25
p. 15436	25
31 Fed. Reg. 8370 (1966)	13, 19
32 Fed. Reg. 10298 (1967)	13
<i>Leave Time for Observing Religious Holidays: Hearing Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 95th Cong., 2d Sess. (1978)</i>	25
S. Rep. 95-1143, 95th Cong., 2d Sess. (1978)	25

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION, ET AL., PETITIONERS

v.

RONALD PHILBROOK, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT*

**BRIEF FOR THE UNITED STATES AND THE EQUAL
EMPLOYMENT OPPORTUNITY COMMISSION AS
AMICI CURIAE SUPPORTING AFFIRMANCE**

INTEREST OF THE UNITED STATES

This case concerns the extent of an employer's obligation under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, to accommodate the religious beliefs and practices of employees. Pursuant to Title VII, the Attorney General and the Equal Employment Opportunity Commission have substantial responsibility for enforcement of federal laws providing for equal employment opportunity (see 42 U.S.C. 2000e-5(a) and (f)(1)).¹ In addition, the federal government is obligated

¹ The Attorney General also has responsibility for enforcement of a variety of other federal laws proscribing discrimination on

to comply with Title VII in its capacity as the nation's largest employer (42 U.S.C. 2000e-16; see also 5 U.S.C. 5550a (allowing federal employees to work overtime to restore hours taken off for religious observance)). Although this action was brought by a private plaintiff against a school board and a union, the issues raised are similar to those arising in suits brought by and against the federal government. Hence, the resolution of the issues presented in this case will directly affect the government's enforcement and compliance responsibilities under Title VII. The strong federal interest in these and related issues prompted our participation as amicus curiae in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), *Parker Seal Co. v. Cummins*, 429 U.S. 65 (1976), vacated and remanded, 433 U.S. 903 (1977), and *Dewey v. Reynolds Metals Co.*, 402 U.S. 689 (1971).

STATEMENT

Respondent Ronald Philbrook (Philbrook), a high school teacher, brought this action in federal district court for damages and equitable relief against petitioner Ansonia School Board (school board) and respondent Ansonia Federation of Teachers (union), alleging that the school board and union had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, by failing reasonably to accommodate Philbrook's need to be absent from work on days of mandatory religious observance (J.A. 3-8). Title VII requires that an employer "reasonably accommodate" an employee's religious observance or practice unless doing so would cause "undue hardship" on the employer's business. See 42 U.S.C. 2000e-2(a), 2000e(j). Following a two-day trial, the district court dismissed the complaint on the ground that

account of religion, including those requiring nondiscrimination in housing (42 U.S.C. 3601 *et seq.*), public accommodations (42 U.S.C. 2000a *et seq.*), public facilities (42 U.S.C. 2000b *et seq.*), public education (42 U.S.C. 2000c-6), and certain other federally protected activities (18 U.S.C. 245).

Philbrook had failed to prove a violation of Title VII. On appeal, the court of appeals reversed, holding that Philbrook had made out a prima facie case of religious discrimination under Title VII. The court of appeals also instructed the district court to determine on remand whether Philbrook's proposed accommodations would cause the school board "undue hardship."

1. Philbrook is a high school teacher of typing and business and, since 1968, has been a member of the Worldwide Church of God (Pet. App. 2a, 27a). Philbrook's religious beliefs require that he refrain from secular employment on designated holy days, the precise dates of which vary from year to year (*id.* at 2a, 27a-28a). Observance of the holy days would require Philbrook to miss an average of six school days each year (*ibid.*).

The school board's leave policies since 1968 have been established by a series of collective bargaining agreements entered into between the school board and the union (Pet. App. 3a, 28a-29a).² Although the leave policies have changed in certain respects since 1968, those provisions regarding leave for mandatory religious observance have remained basically the same. An employee is allowed three days of paid leave each year for mandatory religious observance. Days taken off for that purpose are not deducted from the 18 days of annual paid leave otherwise provided for by the agreement.³ The collective bargaining agreements have consistently provided that the school board will deduct approximately one day's salary for each day of unauthorized absence.⁴

² Pertinent portions of the collective bargaining agreements since 1967 are reproduced at J.A. 71-101.

³ The 1968-1969 agreement is the sole exception. Under that agreement, days taken off for religious holy days were deducted from available annual leave (see J.A. 75).

⁴ There are approximately 180 days in the school year and the salary deduction is currently 1/180 of the employee's annual salary (Pet. App. 4a n.1; J.A. 63, 101). Prior to the 1971-1972 agreement,

The employee may use the other 18 days of paid annual leave, which currently may be accumulated over several years to 180 days, only for those purposes set out in the agreement. Some of the categories of leave have specified annual limits, separate from the overall 18-day ceiling. Mandatory religious observance is not a permissible purpose for use of any of the 18 days (Pet. App. 5a n.2; J.A. 99). Examples of permissible categories to which an employee may, within applicable limits, apply the 18 days of annual leave include a personal or immediate family illness, a death in the immediate family, a funeral, an immediate family wedding, graduation, or religious ceremony, and a national veterans or national or state teachers conference. See Pet. App. 4a-5a n.2; J.A. 98-99. Also included within the 18-day ceiling is a maximum of 3 days of paid annual leave for "necessary personal business," the scope and operation of which has been more expressly defined in each succeeding agreement.⁵ Since 1978, the agreements have allowed employees to use one of the three days of necessary personal business leave without prior approval as long as the employee provides the immediate supervisor with 48-hour notice (J.A. 95, 99). Consistent with the general proscription on the use of any of the 18 days of annual leave for mandatory religious observance and with the more specific prohibition on the use of necessary personal business leave for a purpose covered by any other category of leave, the agreements since 1970 have expressly provided that necessary per-

the deduction was 1/200 of the employee's annual salary (Pet. App. 4a n.1; J.A. 76, 78, 81).

⁵ The 1982-1985 agreement excludes from "necessary personal business" any activity covered by any other leave category, including travel associated with any such provision. In addition, the agreement specifically excludes several activities, including attendance of, or participation in a marriage or sporting or recreational event, and the "[d]ay following marriage or wedding trip" (J.A. 100).

sonal business does not include any religious observance (*id.* at 80, 83, 86, 89, 92, 96, 100).

Since 1968, Philbrook has taken the three days of paid leave for mandatory religious observance allowed by the collective bargaining agreements. From the outset, the school board has permitted Philbrook to take *unpaid* leave for religious holidays in excess of the three days and, prior to 1976, Philbrook took some days of unpaid leave on religious holy days (Pet. App. 6a, 32a). Since 1976, however, Philbrook has taken no days of unpaid leave on account of religious holy days and has instead either worked or scheduled hospital visits on those days in order to charge the absence to annual leave (*ibid.*). Philbrook states that family financial needs prevented him from taking days of unpaid leave after 1976 (*ibid.*). The school board has rejected Philbrook's requests that the school board either allow him to apply "personal business" paid annual leave to religious holy days; pay him, when he takes "leave without pay" for religious reasons, the difference between the cost of a substitute (approximately \$30 per day) and his salary (approximately \$130); or allow him to make up for missed workdays by doing meaningful school work at other times (Pet. App. 6a-7a, 18a & n.9).

2. In 1973, Philbrook filed a complaint against the school board and the union with the state Commission on Human Rights and Opportunities and the federal Equal Employment Opportunity Commission (EEOC) (Pet. App. 7a). Both the state commission and the EEOC found reasonable cause to believe that the leave policy established by the collective bargaining agreements unlawfully discriminated against religion by preventing Philbrook from using "necessary personal business" paid annual leave for his days of religious observance in excess of three days (*ibid.*; J.A. 104-117). The state and federal agencies each undertook conciliation efforts, which failed to reach an accord among the parties (Pet. App. 7a; see J.A. 104-110, 118-123). In September

1977, the EEOC issued Philbrook a right-to-sue letter (Pet. App. 7a).

3. In December 1977, Philbrook filed a complaint in federal district court alleging that the school board and the union had violated Title VII and the Free Exercise Clause of the First Amendment. Following a two-day trial, the district court dismissed the complaint on the ground that Philbrook had failed to prove unlawful religious discrimination under either the First Amendment or Title VII (Pet. App. 26a-37a). According to the court, because Philbrook was entitled to take leave without pay he had "not been placed by the School Board * * * or by the Union * * * in a position of violating his religion or losing his job" (*id.* at 37a) and therefore he had failed to state a claim for relief (*id.* at 35a, 36a).⁶

4. The court of appeals reversed, reaching only the Title VII claim (Pet. App. 1a-21a).⁷ The court first ruled that Philbrook had made out a *prima facie* case of unlawful religious discrimination (*id.* at 8a-11a). The court rejected the district court's apparent ruling that a valid claim of religious discrimination under Title VII requires a showing that the employee would be discharged for exercising his religious beliefs (*id.* at 11a-12a). The court also rejected the school board's defense that providing Philbrook with three days of paid leave and additional days of unpaid leave for religious observance satisfied Title VII (*id.* at 13a-15a). Even as-

⁶ The sincerity of Philbrook's religious beliefs is not an issue before the Court. While expressing "some doubts" about the sincerity of Philbrook's religious beliefs, the trial court declined to make any finding concerning their sincerity (Pet. App. 33a-34a). The court of appeals also assumed the sincerity of his beliefs (*id.* at 9a).

⁷ In remanding the case to the district court for further proceedings, the court of appeals noted that the "First Amendment issues remain open, if [Philbrook] should lose on the Title VII issues on remand" (Pet. App. 21a n.12). Philbrook's Free Exercise claim is not currently before the Court.

suming that the school board's accommodation was "reasonable," the court held, Title VII's duty to accommodate the religious beliefs of employees requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business (*id.* at 14a).

The court of appeals also rejected the school board's claim that the district court's dismissal of Philbrook's complaint should nonetheless be affirmed because the current record demonstrates that Philbrook's proposed accommodations would, as a matter of law, cause undue hardship (Pet. App. 16a-17a). With respect to Philbrook's proposal that the school board allow him to use "necessary personal business" leave, the court conceded that "[t]he critical factual question * * * is the past and current scope of [that] leave provision[]" (*id.* at 16a). The court was uncertain, however, of the scope of the "necessary personal business" category,⁸ and concluded that "if the * * * provision is as broad as [Philbrook] claims, it becomes difficult to believe that dropping the religious exception causes undue hardship" (*id.* at 16a-17a (footnote omitted)).

The court similarly refused to reject out-of-hand Philbrook's alternative proposal that the school board should pay him the difference between the cost of the substitute and his salary and allow him to make up for time off (Pet. App. 17a). The court explained that the trial court had not yet focused on the cost of the proposed accommodation nor considered possible ways to minimize those problems (*ibid.*).

Finally, the court of appeals took issue with the district court's and the school board's suggestion that Philbrook was seeking subsidization of his religious beliefs and impermissible preferential treatment based on those

⁸ The court explained that while "[t]he provision does include the words 'legitimate and necessary' [it] le[aves] unsaid * * * whether leaving the reason to the teacher's discretion abrogates this limiting language" (Pet. App. 16a).

beliefs, contrary to this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977) (Pet. App. 18a-20a). The court stressed that Philbrook "has offered to pay the cost of the substitute and to make up for time off: [he] does not ask for payment for time when he is not working" (*id.* at 18a & n.9). The court did not address the school board's argument that the proposed accommodations would violate the Establishment Clause, leaving the issue open on remand (*id.* at 20a n.11).

One judge dissented from the panel opinion (Pet. App. 22a-24a). The dissent argued that the paid leave policy was facially neutral and, while perhaps inadequate, did not constitute employment discrimination within the meaning of Title VII (*id.* at 22a-23a). "Paid leave from employment," the dissenting judge reasoned, "is neither contractually nor Constitutionally mandated" (*id.* at 24a).

SUMMARY OF ARGUMENT

1. Title VII of the Civil Rights Act of 1964 makes unlawful employment practices that discriminate on the basis of an employee's religion and in addition includes the affirmative obligation that employers reasonably accommodate the religious beliefs of their employees unless such accommodation would cause undue hardship to the conduct of their business. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977). The courts below sharply differed in their construction of this mandate, but in our view, both courts misread Title VII.

Contrary to the opinion of the district court, Title VII is not concerned solely with eliminating employment practices that unjustifiably force an employee to choose between his religion and his job. Title VII extends to less onerous deprivations, forbidding discrimination with respect to *any* terms of employment (including compensation, conditions, or privileges) and requiring accommodation of conflicts between employment status and religious beliefs. See 42 U.S.C. 2000e(j).

Although the court of appeals properly rejected the district court's crabbed reading of Title VII, the court overstated the extent of an employer's accommodation obligation. According to the court of appeals, "[w]here the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the *employee* prefers unless that accommodation causes undue hardship on the employer's conduct of his business" (Pet. App. 14a (emphasis added)). We disagree. The employer's duties under Title VII end once the employer offers the employee a reasonable accommodation. Under the literal terms of the statute, the undue hardship inquiry is necessary only where the employer claims that *no* reasonable accommodation is possible.

A "reasonable accommodation," within the meaning of Title VII, moreover, is concerned solely with reconciling conflicts between the employee's status as an employee and his religious beliefs. Hence, a proposed accommodation is not rendered "unreasonable" on the ground that it interferes with secular, nonemployment-related needs of the employee. For example, the reasonableness of an employer's proffered accommodation does not, unless motivated by an impermissible discriminatory motive, turn on its compatibility with competing demands on the employee's time generated by secular activities outside of work. The accommodation is reasonable as long as the employer has both eliminated any conflict between the employee's employment responsibilities and religious beliefs or observance and reasonably preserved the employee's employment status.

2. Whether the school board's leave policy satisfies Title VII is a difficult question which cannot be completely answered without further factual inquiry on remand. We agree with the intimation of both courts that Title VII does not generally require employers to provide employees with days of *paid* leave for observance of religious holy days. The gravamen of Philbrook's complaint, however, does not depend on a general claim of

entitlement to paid leave for mandatory religious observance. Philbrook bases a request for paid leave on his allegation that the school board's leave policy unlawfully discriminates against religion by expressly disallowing the use of "necessary personal business" paid leave for days of mandatory religious observance. An employer's leave policy is not unlawfully discriminatory, however, whenever it excludes the use of certain categories of paid leave for mandatory religious observance. An employer should normally be free to establish distinct categories of paid leave for specific, nonwork-related secular activities when the employer also provides a comparable category of paid leave for mandatory religious observance.

Whether the school board's leave policy impermissibly discriminates on the basis of religion, therefore, depends on the scope of the various paid leave categories provided for in the school board's contract. In particular, if the "necessary personal business" leave category is narrowly drawn and applied, we perceive no legal infirmity in the school board's policy, primarily because the school board has provided for comparable paid leave for mandatory religious observance. If, on the other hand, the necessary personal business leave category is more broadly applied—granting, in effect, paid leave for any secular activity—the distinction drawn is of potential concern to Title VII. The trial court has not yet addressed these important factual questions and thus a remand is required. For similar reasons, we find unavailing the school board's alternative argument that the current record shows that further accommodation is, in all events, excused because it would cause "undue hardship." A finding of undue hardship, too, would be appropriate only after factual inquiry and findings by the trial court in the first instance.

Finally, we do not share the school board's view that the complaint should be dismissed because any further Title VII accommodation would impermissibly advance religion in violation of the Establishment Clause. "An

exemption adopted by Congress to accommodate religious beliefs [does] not violate the First Amendment's Establishment Clause" (*Bowen v. Roy*, No. 84-780 (June 11, 1986), slip op. 18 n.19 (Burger, C.J.)). We therefore join respondent Philbrook in asking this Court to affirm the judgment below, reversing the district court's dismissal of the complaint and remanding the case for further proceedings.

ARGUMENT

AN EMPLOYER REASONABLY ACCOMMODATES THE RELIGIOUS BELIEFS OF AN EMPLOYEE WITHIN THE MEANING OF TITLE VII OF THE CIVIL RIGHTS ACT BY OFFERING THE EMPLOYEE A COMBINATION OF PAID AND UNPAID LEAVE FOR MANDATORY RELIGIOUS OBSERVANCE UNLESS THE EMPLOYER'S PAID LEAVE POLICY DISCRIMINATES AGAINST RELIGIOUS ACTIVITIES

This case concerns the extent to which Title VII requires employers to accommodate the religious beliefs of their employees. In Part A we discuss the responsibilities the statute places on employers generally. We conclude that an employer satisfies Title VII when he provides an accommodation that both eliminates any conflict between the employee's religious beliefs and employment requirements and reasonably preserves the employee's employment status. The express words of the statute also compel the conclusion that the employer meets his Title VII obligation by proposing to the employee one possible reasonable accommodation. The employer is not obliged to accept the particular accommodation preferred by the employee.

In Part B we discuss whether the school board's leave policy, which does eliminate any direct conflict between Philbrook's religious beliefs and his employment requirements, also reasonably preserves Philbrook's employment status. Generally an employer does not interfere with

the employee's employment status when it accommodates religious conflicts by providing for unpaid leave for religious holidays. But if the employer's paid leave policy discriminates against religion, the policy violates Title VII. Further factual inquiry is necessary to determine whether the school board's paid leave policy fails to preserve Philbrook's employment status by treating secular reasons for absences more favorably than religious reasons for absences.

Finally, in Part C we discuss whether either Title VII's nondiscrimination mandate or the Establishment Clause forbids accommodation efforts that, in effect, provide a "preference" or "privilege" to certain employees based on conflicts between their religious needs and employment status. We conclude that Title VII's literal terms *require* such accommodations in certain circumstances and that the Establishment Clause does not forbid that result.

A. An Employer Complies With Title VII When It Reasonably Accommodates The Religious Beliefs Of An Employee By Eliminating Any Conflict Between Those Beliefs And Employment Requirements While Reasonably Preserving The Employee's Employment Status

When Congress first enacted Title VII in 1964, the law provided, without elaboration, that employment discrimination on the basis of the employee's religion, like discrimination on the basis of race, color, sex, or national origin, was unlawful. Pub. L. No. 88-352, § 703, 78 Stat. 255. Not until Congress amended Title VII in 1972 did the law expressly require employers to accommodate the religious beliefs of employees. Pub. L. No. 92-261, § 2(7), 86 Stat. 103. The 1972 amendment, borrowing largely from revisions by EEOC in 1967 to guidelines first promulgated in 1966,⁹ had "[t]he intent and effect of * * *

⁹ The original EEOC guidelines outlining the accommodation duties of an employer provided that an employer should "accommodate * * * the reasonable religious needs of employees * * * where

mak[ing] it an unlawful employment practice under [Title VII] for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977).¹⁰

In *Trans World Airlines, Inc. v. Hardison*, *supra*, this Court addressed the same issue posed in this case: "the extent of the employer's obligation under Title VII to accommodate an employee whose religious beliefs prohibit him from working on [certain days]" (432 U.S. at 66). The statutory touchstone of employer compliance differs, however, in this case. In *Hardison*, the employer had *discharged* the employee because the employee, based on his religious beliefs, was unwilling to work on Saturdays. Hence, whether the employer had violated Title VII turned on whether the employer had demonstrated that it was unable reasonably to accommodate the employee's Saturday absences without undue hardship in the conduct of its business. This Court held that an accommodation eliminating the conflict would impose "undue hardship" on the employer because it would "require [the employer] to bear more than a *de minimis* cost" (*id.* at 84).

such accommodation can be made without serious inconvenience to the conduct of the business" (31 Fed. Reg. 8370 (1966)). In 1967, EEOC revised the guidelines to provide that the employer should "make reasonable accommodations to the religious needs of employees * * * where such accommodations can be made without undue hardship on the conduct of the employer's business" (32 Fed. Reg. 10298). The 1972 amendment to Title VII adopts much of the 1967 guideline. See note 10, *infra*.

¹⁰ Congress amended Title VII to include an express accommodation requirement by adding Section 701(j), which defines religion as "includ[ing] all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)).

In this case, the school board has not discharged Philbrook and it primarily contends that its leave policy already provides a reasonable accommodation. This case, therefore, concerns the distinct question (not addressed in *Hardison*) of what constitutes a reasonable accommodation, including whether the employer may choose its preferred accommodation when several are possible.

The courts below sharply differed in their responses to this basic issue of Title VII construction, but we believe that both courts, in different ways, misapprehended the scope of an employer's obligations under Title VII. The district court dismissed Philbrook's complaint on the threshold ground that he "ha[d] not been placed by the School Board or * * * by the Union * * * in a position of violating his religion or losing his job" (Pet. App. 37a). The trial court's disposition of the case, therefore, appears to rest on the supposition that Title VII's nondiscrimination mandate limits only employer decisions to discharge an employee.¹¹

The court of appeals properly rejected this narrow view of Title VII's scope. Title VII is not concerned solely with employment discrimination resulting in discharge of an employee. Title VII is concerned as well with less onerous deprivations including those affecting the employee's "compensation, terms, conditions, or privileges of employment" (42 U.S.C. 2000e-2(a)(1)). Title VII, moreover, broadly denounces efforts by the employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" (42 U.S.C. 2000e-2(a)(2)).¹² An employer therefore must do more

¹¹ The school board presses the analogous argument that "the failure to provide such a benefit does not support a charge of discrimination under Title VII." See Pet. Br. 21; see also Equal Employment Advisory Council Amici Br. 9-14; AFL-CIO Amicus Br. 5-12.

¹² The argument of amicus AFL-CIO (Br. 5-12) that Congress made religious discrimination unlawful due primarily to congress-

than just eliminate any conflict between the employee's religious beliefs and employment requirements. The employer's accommodation obligations under Title VII extend to efforts to *preserve* the employee's employment status, including both employment opportunities and privileges.¹³ See *American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 776-777 (9th Cir. 1986).

The court of appeals, however, erred in *overstating* the extent of an employer's accommodation obligations under Title VII. Its conclusion that an employer must, absent a showing of undue hardship, accept the particular accommodation preferred by the employee is inconsistent with the clear import of the statutory language. Title VII provides that it is unlawful for an employer to discriminate on the basis of religion "unless an employer demonstrates that he is unable to reasonably accommodate * * * an employee's * * * religious observance or practice without undue hardship on the conduct of the employer's business" (42 U.S.C. 2000e(j)). Under the

sional concern with religious observers being denied employment altogether is not to the contrary. The AFL-CIO agrees that compliance with Title VII includes a duty not to inflict "hardships needlessly" (Br. 9 n.4) and not to discriminate with respect to the terms of employment (*id.* at 12-14).

¹³ For this reason, the school board's attempt (Pet. Br. 14-15) to draw support from this Court's Free Exercise precedent is misguided. The Free Exercise Clause allows certain neutral systems of awarding benefits, but, "[a]s a matter of legislative policy," Congress enacted Title VII "to make religious accommodations" and, consequently, different considerations apply. Cf. *Bowen v. Roy*, No. 84-780 (June 11, 1986), slip op. 18 (Burger, C.J.). The school board's analogy (Pet. Br. 18-20) to decisions of this Court involving allegations of sex-based discrimination is similarly flawed. Under the school board's erroneous reading of Title VII, an employer who treated all religions the same—by refusing any accommodation to all—would comply with Title VII. Title VII's prohibition on religious discrimination, however, includes an affirmative accommodation requirement that is not expressly extended to other prohibited categories of discrimination such as discrimination on the basis of sex.

literal terms of the statute, the employer need rely on a showing of "undue hardship" only in those cases where the employer is claiming that *no* reasonable accommodation is possible. "[U]ndue hardship" therefore is simply a defense to an employer's failure to offer a reasonable accommodation. As long as the employer is reasonably accommodating the employee, the employer is under no obligation to show that an alternative accommodation preferred by the employee would cause it undue hardship. The sole judicial inquiry is whether the employer's proposed accommodation is reasonable.

Furthermore, because the statutory language requires only a "reasonable" accommodation of an employee's religious needs, his employment status need not be absolutely preserved. Cf. *Estate of Thornton v. Caldor, Inc.*, No. 83-1158 (June 26, 1985), slip op. 2 (O'Connor, J., concurring). Reasonable preservation of employment status is sufficient. When the burdens on employment status are de minimis, employment status has been reasonably preserved, but the adverse effects, if any, should not be material and substantial. Whether a particular accommodation reasonably preserves employment status turns, moreover, on an *objective* assessment of the employment relationship. And because the employer inherently retains its traditional management prerogatives to the extent they do not directly conflict with Title VII's requirements, the employer, not the employee, has the right to choose among reasonable accommodations.¹⁴ Cf. *United Steelworkers v. Weber*, 443 U.S. 193, 207 (1979); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 578 (1978).

¹⁴ In assessing the reasonableness of the accommodation provided by the employer, courts should consider the range of alternative accommodations suggested by the EEOC's guidelines. 29 C.F.R. 1605.2(d). However, if an employer selects one accommodation suggested by the guidelines over another suggested accommodation, or if the employer selects a different accommodation that the court nonetheless finds to be reasonable, the employer need not show that the employee's preferred accommodation would cause undue hardship.

Moreover, the reasonableness of an employer's proffered accommodation does not turn on its compatibility with competing demands on the employee's time generated by secular activities outside of work.¹⁵ Thus, neither the employee's own subjective assessment of the accommodation nor his secular, *non-employment* related needs are relevant to the inquiry. See *American Postal Workers Union*, 781 F.2d at 776. Title VII is concerned only with redressing impermissible discrimination within the employment relationship and not with rewriting employment contracts to redress employee grievances generally.¹⁶

¹⁵ For example, an employee may find a particular accommodation involving a shift in work hours undesirable because he would prefer not to work with certain other employees or because the new schedule would conflict with outside recreational interests. Neither of these considerations, however, would bear on the reasonableness of the accommodation within the meaning of Title VII. Title VII requires accommodation of the employee's religious beliefs, including preservation of the employment relationship, not accommodation of secular, nonemployment related interests of the employee. Such matters are, as always, governed by specific employment contracts and outside the scope of Title VII, unless, of course, an employee demonstrated that the employer deliberately selected a particular accommodation adverse to the employee because of his religious beliefs or observances in order "to discriminate invidiously or * * * covert[ly] suppress[] * * * particular religious beliefs." See *Bowen v. Roy*, slip op. 9.

¹⁶ This reading is not inconsistent with the current EEOC guidelines which provide that "the employer * * * must offer the alternative which least disadvantages the [employee] *with respect to his or her employment opportunities*" (29 C.F.R. 1605.2(c)(2)(ii) (emphasis added)). The guidelines confirm that only impacts on the employee's employment status are relevant. We do not believe the guidelines should be read as endorsing the view that a mere de minimis or insubstantial burden on an individual's employment status is sufficient to render a proposed accommodation unreasonable. Certainly neither the statutory language of Title VII nor its legislative history suggests such a lopsided construction of either the term "reasonable" or "accommodation." See, e.g., 118 Cong. Rec. 706 (1972) (remarks of Sen. Randolph) ("usually the * * *

B. The School Board Policy Of Providing An Employee With Paid And Unpaid Leave For Mandatory Religious Observance Is Reasonable As A Matter Of Law Unless The School Board's Paid Leave Policy Discriminates Against Religion

1. For the reasons previously given (pages 15-16, *supra*), we agree with the school board that if the current leave policy provides a reasonable accommodation,¹⁷ remand for an undue hardship inquiry is unnecessary and Philbrook's complaint should be dismissed. Because, however, we believe that further factual inquiry is necessary to determine whether the current accommodation is reasonable, we nonetheless conclude that remand is warranted and support the judgment of the court of appeals.

We agree at the outset with the intimation of both courts below that Title VII does not generally require employers to provide employees with days of *paid* leave for observance of religious holy days.¹⁸ Indeed, an em-

employer and the employee[] are of an understanding frame of mind and heart * * * and * * * desire to achieve an adjustment"); see also *American Postal Workers Union v. Postmaster General*, 781 F.2d 772, 777 (9th Cir. 1986) (stressing need for "bilateral cooperation"); *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-146 (5th Cir. 1982) (same).

¹⁷ The court of appeals' statement (Pet. App. 13a-14a) that the school board's accommodation was reasonable was rooted in its erroneous assumption that Title VII would nonetheless require an undue hardship inquiry. The statement was not based, as required by Title VII, on consideration of the degree to which the accommodation eliminated conflicts between the employee's religious observances and work requirements, while preserving employment status.

¹⁸ The district court dismissed Philbrook's complaint based, in part, on the court's view that Philbrook claimed such a general entitlement to paid leave for religious holy days. See Pet. App. 35a, 36a. The court of appeals appears to have agreed that Title VII creates no such general entitlement and to have ruled in favor of Philbrook only because the court concluded that Philbrook's claim did not rest on such a broad proposition. *Id.* at 18a & n.9, 20a.

ployer proposal to allow an employee to take *unpaid* leave for observance of religious holy days would, in many circumstances, constitute a reasonable accommodation as a matter of law. See, e.g., *Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe*, 735 F.2d 388, 391 (10th Cir. 1984); cf. *Monroe v. Standard Oil Co.*, 452 U.S. 549, 564 (1981) ("[A] 'reasonable accommodation' to employee-reservists because of missed worktime has already been made by Congress in [the statute]. There, Congress decided what allowance employers should make to reservists whose duties force them to miss time at work: provide them a leave of absence."). Direct conflict between employment requirements and religious beliefs is eliminated by the provision of unpaid leave because the employer is not requiring the employee to work on a religious holy day. And, at least as a general proposition, "[t]he direct effect of [unpaid leave] is merely a loss of income for the period the employee is not at work; such an exclusion has no direct effect upon either employment opportunities or job status" (*Nashville Gas Co. v. Satty*, 434 U.S. 136, 145 (1977)).¹⁹

The basic premise of the employment relationship is, of course, that the employer provides compensation in exchange for work performed by the employee. If the employee is denied a day's pay for a day *not* worked, he has not suffered any denial of a privilege or condition of employment and thus has suffered no burden on his

¹⁹ Current EEOC guidelines support the reasonableness of an accommodation in which the employer offers the employee unpaid leave. The guidelines provide that a "[r]easonable accommodation * * * is generally possible where a voluntary substitute with substantially similar qualifications is available" (29 C.F.R. 1605.2 (d) (1) (i)). Presumably, the employer is not obliged to pay *both* the substitute and the employee taking time off from work. Former EEOC guidelines speak more directly and leave no doubt as to the reasonableness of an accommodation allowing unpaid leave. See 31 Fed. Reg. 8370 (1966) ("An employer may permit absences from work on religious holidays, with or without pay, but must treat all religions with substantial uniformity in this respect.").

employment status. He has simply been denied a "bonus" beyond that generally granted to his fellow employees for secular purposes. Title VII does not compel subsidization of an employee's religious beliefs beyond that provided to other employees for similar secular purposes. See *Pinsker v. Joint Dist. No. 28J of Adams & Arapahoe*, 735 F.2d at 391 (school board was not required to provide plaintiff with additional paid leave for religious observance beyond the two days of "special leave" provided to all employees).

The commonsense notion that unpaid leave provides a reasonable accommodation as a matter of law is not, however, without limitation. An employer's leave policy may impermissibly discriminate against religion by, for example, providing paid leave for certain secular, non-employment related activities, but denying paid leave for similar religious activities. Title VII does not "unconditionally impos[e] upon employers an obligation to continue to pay their employees their regular paychecks when they absented themselves from work for [religious] reasons * * *[, but such payments may be required if a]n employer 'discriminates' against an employee [by] treat[ing] that employee less favorably than he treats other similarly situated" (*Whirlpool Corp. v. Marshall*, 445 U.S. 1, 18-19 (1980) (footnote omitted)).²⁰

²⁰ So, too, if the relative amount of unpaid leave that must be taken by the employee is substantial, the employer should be obliged to consider the possibility of a shift in work hours. Cf. *Monroe v. Standard Oil Co.*, 452 U.S. at 564; *id.* at 575 (Burger, C.J., dissenting) ("[important] 'incident or advantage of employment' [includes] opportunity for full-time work undiminished by * * * absences for military training"). For example, if the employee's current work schedule requires him to take off one day each week for the Sabbath, an employer's proposal to allow unpaid leave would not amount to a reasonable preservation of employment status; the relative amount of unpaid leave required would be substantial. See 29 C.F.R. 1605.2(d). If, moreover, the employer conducts business 24 hours a day, seven days a week, the employer should consider the possibility of a shift in work hours that would allow

2. Philbrook's complaint does not depend, at bottom, on the general claim that Title VII entitles employees who need to take days off for religious observance with paid leave. If it did, we would readily agree with the school board that the complaint should be dismissed. Nor does the complaint depend on the equally erroneous notion that the school board's leave policy is discriminatory because the amount of paid leave is inadequate. Cf. *Alexander v. Choate*, No. 83-727 (Jan. 9, 1985).²¹ Instead, Philbrook complains that the school board's leave policy discriminates against religion by barring the use of "necessary personal business" leave for mandatory religious observance (J.A. 3-4).

The school board's fairly intricate leave policy provides many specific categories of paid leave, including three days of paid leave for mandatory religious observance. It also provides three days of paid leave for "necessary personal business," but leave for "necessary personal business" may not be used for any purpose described in the specific leave categories, and thus may not be used for religious leave.

As a general rule, an employer is free to establish distinct and exclusive categories of paid leave for specific,

the employee to work full-time. Cf. *ibid.* Of course, as in *Hardison*, the employer might well establish that a work-schedule change causes undue hardship. See 432 U.S. at 76-77. The employee would nonetheless be entitled to that additional consideration and a hardship showing.

²¹ We disagree with the proposition, advanced by the court of appeals, that the school board's leave policy "facially discriminates on the basis of religion" because it "afford[s] some teachers all the [paid] leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year" (Pet. App. 12a). This Court rejected a similar contention in *Alexander v. Choate*, *supra*. There, the Court held that a 14-day limitation on inpatient hospital coverage for Medicaid recipients did not discriminate against handicapped recipients in violation of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, even assuming that the limitation might disproportionately affect the handicapped.

nonwork-related secular activities as long as the employer also provides a comparable category of paid leave that can be used for mandatory religious observance.²² Moreover, an employer's leave policy is not impermissibly discriminatory whenever it excludes the use of certain categories of paid leave for mandatory religious observance. Surely the school board does not discriminate against Philbrook by forbidding him from using the five days allocated for "death in the family" for his religious observance. Nor does an atheist employee suffer discrimination when he is denied use of the three days for religious observance to supplement some other specified leave category.

Thus we agree with the court of appeals that "[t]he critical factual question * * * is the past and current scope of the personal business leave provisions" (Pet. App. 16a). Although Title VII does not impose limitations on the employer's authority to structure a leave policy as long as the categories of leave either are so open-ended as to provide the employee with complete discretion, or are strictly confined to employment-related purposes, the school board's "necessary personal business" category raises the important question whether leave for secular, nonemployment purposes is being granted more generously than leave for religious purposes. If, as amicus AFL-CIO contends (Br. 14-17), the necessary personal business leave category is both narrowly drawn and applied, we would agree that its ex-

²² This is not to say that every time an employer provides any leave for a limited, specific, secular purpose it must make leave available for religious purposes in order reasonably to preserve the religious observer's employment status. For instance, Title VII would certainly not require that an employer who allows employees paid leave for personal illness, must, for that reason, provide paid leave for religious holidays. Nor would an employer always be required to establish paid religious leave if it provides *any* leave for some secular, nonemployment related purpose—such as military duty—in order reasonably to accommodate the religious needs of its employees.

clusion of religious leave, in addition to other types of secular leave, does not amount to impermissible religious discrimination. If, however, the "necessary personal business" category is, in practical effect, an all-purpose secular leave provision that the union contract provides *in addition to* the array of specific secular paid leave categories also included in the leave policy, we would agree with Philbrook (as would amicus AFL-CIO (Br. 13-14)) that the overall leave policy discriminates against religion in violation of Title VII.

Based on the current record, however, we can only speculate as to the actual scope of the necessary personal business category and for this reason we believe that remand is warranted. As the court of appeals noted (Pet. App. 16a-17a), although the wording of the leave category, particularly the term "necessary," suggests a narrow construction, the category's allowance for teacher discretion and Philbrook's claim that such leave is freely granted for secular purposes create substantial doubt about the category's actual scope in application.²³ Moreover, because the district court applied an incorrect legal standard, remand is appropriate to permit the trial court to apply the correct legal standard to the facts of this case in the first instance. *Pullman-Standard v. Swint*, 456 U.S. 273, 291-292 (1982).²⁴

²³ Of course, while the court of appeals concluded the remand was necessary to consider the school board's undue hardship (Pet. App. 17a), we believe remand is necessary to address whether the school board's current accommodation, as reflected in its leave policy, discriminates against religion.

²⁴ Even if this Court should find as a matter of law that the school board's leave policy is not a reasonable accommodation, remand would be necessary because the scope of the necessary personal business leave category would bear on the school board's ability to demonstrate undue hardship. For example, if the necessary business provision was broadly applied in practice, the school board would be hard-pressed to contend that extending its scope to include religious holy days would cause undue hardship.

3. Philbrook's remaining contentions may be disposed of briefly. Philbrook argues that the school board's current accommodation is unreasonable because the cost of a substitute teacher is less than his lost salary for a day of absence and, consequently, the school board's reduction of his pay is excessive. But Philbrook's request is simply a slight variation on the notion, already rejected, that Title VII entitles employees to paid leave, regardless of its treatment of other employees. Absent a showing (and we know of none) that the school board follows the novel policy of providing employees absent for secular reasons with the equivalent of an employment agency's commission (based on any salary differential), Philbrook's request lacks merit.

Philbrook's related argument that the school board's current accommodation is unreasonable because the school board has not considered the possibility of allowing him to do meaningful work at school at other times is similarly unavailing. This case is not one where the availability of work-schedule changes limits the reasonableness of using unpaid leave to accommodate an employee's religious beliefs (see note 20, *supra*). The purpose of a work-schedule shift is to allow the employee to accomplish the same (or equivalent) work, but at a different time. What Philbrook requests is the right to do some other "meaningful work" at a different time, presumably because he can only teach his classes at certain prescribed times. We do not believe that the employer's accommodation obligation extends to determining whether it might be able to employ the individual in a *different* capacity.²⁵

²⁵ Notably, Congress has chosen to "reasonably accommodate" the religious beliefs of federal employees by allowing federal employees to "elect to engage in overtime work for time lost for meeting * * * religious requirements" (5 U.S.C. 5550a). Consistent with the explicit statutory concern with maintaining the efficiency of government operations, the implementing regulations provide that the employing federal agency need not allow such a shift in work

C. Accommodation Of Philbrook's Religious Beliefs Neither Offends Title VII Nor Implicates The Establishment Clause

The school board (Pet. Br. 28-30) suggests that Title VII does not require further accommodation of Philbrook's religious beliefs because any additional accommodation would amount to unequal treatment of employees based on religion in violation of Title VII's nondiscrimi-

hours when it would "interfere with the efficient accomplishment of an agency's mission" (5 C.F.R. 550.1002(b)). See also 124 Cong. Rec. 15436 (1978) (remarks of Rep. Solarz) ("if the provision of overtime compensatory work provides an undue hardship on the agency or interfere[s] with its efficiency, the agency need not grant such work"). Members of Congress expressed their belief that forcing federal employees to "choose between meeting the requirements of their faith and suffering a reduction of income or a loss of vacation time * * * is unnecessary, in most cases." S. Rep. 95-1143, 95th Cong., 2d Sess. 10 (1978); 124 Cong. Rec. 15435 (1978) (remarks of Rep. Solarz) ("discriminatory and unnecessary"); *id.* at 15436 (remarks of Rep. Harris) ("unnecessarily punitive and discriminatory"). The Senate Report accompanying the legislation specifically added that "[f]ederal agencies are expected to find meaningful overtime work for employees who request overtime in anticipation of time lost for religious observance" (S. Rep. 95-1143, *supra*, at 11). Of course, how Congress chose, in its discretion, to accommodate the religious beliefs of federal employees does not establish a binding standard of reasonable accommodation on the private sector, particularly when Congress nowhere in the legislation or its legislative history indicated any intent to impose equivalent requirements on the private sector. Nor did Congress suggest that the legislation reflected its own interpretation of what constituted mandatory employer compliance with Title VII, which is applicable to federal employment (see 42 U.S.C. 2000e-16). The Senate Report refers only once to Title VII, and even then only as incidental support for its action. See S. Rep. 95-1143, *supra*, at 10. Testimony during the House hearings on the legislation refers to the federal need to comply with Title VII, but nowhere suggests *congressional* sentiment that the then-pending proposal was necessary to secure compliance with Title VII. See generally, *Leave Time for Observing Religious Holidays: Hearings Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 95th Cong., 2d Sess. (1978).

nation mandate. Alternatively, the school board contends (*id.* at 30-31) that such unequal treatment would, if required by Title VII, impermissibly advance religion in violation of the Establishment Clause. Both contentions misapprehend the scope and meaning of Title VII's reasonable accommodation requirement.

Contrary to the school board's submission, Title VII's nondiscrimination mandate is not offended when an employer accommodates an employee's religious beliefs by providing the employee with a privilege not available to all employees. If it were, Title VII's reasonable accommodation obligation would be rendered meaningless. The fundamental premise of the reasonable accommodation obligation is that facially equal treatment, alone, is not necessarily sufficient under Title VII. Hence, an employer that discharges an employee who refuses, for religious reasons, to work on certain days of the week cannot defend the discharge solely on the ground that all employees are subject to the same employment requirements and penalties. Title VII requires that the employer demonstrate that it was unable reasonably to accommodate the employee without causing undue hardship to the conduct of the employer's business. To be sure, any accommodating step taken by the employer beyond facially equal treatment could be characterized as resulting in a religious "preference" or "privilege," but, whatever its label, Title VII cannot be read as prohibiting the very action plainly required by its literal terms.

Instead, Title VII's nondiscrimination mandate limits employer efforts reasonably to accommodate an employee's religious beliefs only to the extent that those efforts adversely affect the employment status, including employment opportunities and privileges, of *other employees*. Thus, as in *Hardison*, Title VII does not require that an employer give the employee a day off when the employer "would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath"

(432 U.S. at 81). But absent such adverse effects on the employment status of other employees, Title VII does not restrict employer efforts at reasonable accommodation.²⁶ Indeed, the contrary view might call into question the school board's current practice of granting Philbrook paid and unpaid leave for religious holy days. Accordingly, should the district court on remand find that the scope of the necessary personal business leave category is the equivalent of an all-purpose secular paid leave category, Title VII would not *prevent* the school board from allowing Philbrook to use such leave for religious holy days. There would be no apparent adverse effect on other employees; the school board would simply hire a substitute to take Philbrook's classes and other employees would be free, as before, to use their paid annual leave for the purposes specified in the collective bargaining agreement.²⁷

Nor does the Establishment Clause bar the possibility of further accommodation in this case. Title VII is "a statute outlawing employment discrimination based on race, color, religion, sex, or national origin [and] has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society" (*Es-*

²⁶ For example, an employer may allow an employee who is an Orthodox Jew to wear a yarmulke, notwithstanding a general prohibition on the wearing of headgear, without violating Title VII.

²⁷ We do not believe the Court's statement in *Hardison*, 432 U.S. at 85, that Title VII did not require the employer to adopt an accommodation in which "the privilege of having Saturdays off would be allocated according to religious beliefs" should be read as suggesting a different result. The Court's concern was with "constru[ing] [Title VII] to require an employer to discriminate against some employees" (*ibid.* (emphasis added)) and, in *Hardison*, the privilege of taking Saturdays off was clearly a privilege of employment under the collective bargaining agreement. Most importantly, allowing the religious employee to take Saturday off would either have interfered with the seniority rights of other employees to take the day off or have caused the employer undue hardship (*i.e.*, more than de minimis cost). See 432 U.S. at 84.

tate of Thornton v. Caldor, Inc., No. 83-1158 (June 26, 1985), slip op. 2 (citation omitted) (O'Connor, J., concurring). Although, Title VII may, as just described, sometimes require that the employer provide the employee "special" or "preferential" treatment in response to the employee's religious beliefs, such "treatment of religious practitioners does not present the dangers of 'sponsorship, financial support, and active involvement of the sovereign in religious activity,' against which the Establishment Clause is principally aimed" (*Hardison*, 432 U.S. at 90-91 n.4 (Marshall, J., dissenting), quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 668 (1970)). See *Bowen v. Roy*, No. 84-780 (June 11, 1986) (Burger, C.J.).

Moreover, this Court has held that the Free Exercise Clause does mandate accommodation in the nature of a "preference" or "privilege." See *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Establishment Clause should not prohibit the government from requiring private parties to take accommodating actions similar to those required by the Free Exercise Clause. The spectre of a constitutional collision between the Free Exercise and Establishment Clauses underscores the need to distinguish for Establishment Clause purposes between governmental actions and laws intended to "induce" religion and those intended merely to "accommodate" sincerely-held religious beliefs. In our view, although neutral governmental accommodation efforts, such as Title VII, may in some sense facilitate religious practice, they pose no threat to the fundamental principle of separation of church and state embodied in the Establishment Clause.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

CHARLES FRIED

Solicitor General

WM. BRADFORD REYNOLDS

RICHARD K. WILLARD

Assistant Attorneys General

CAROLYN B. KUHLMAN

Deputy Solicitor General

MICHAEL CARVIN

Deputy Assistant Attorney General

RICHARD J. LAZARUS

Assistant to the Solicitor General

BRIAN K. LANDSBERG

HAROLD J. KRENT

LOUISE A. LERNER

Attorneys

JOHNNY J. BUTLER

General Counsel (Acting)

Equal Employment Opportunity

Commission

JULY 1986

No. 85-495

Supreme Court, U.S.

FILED

MAR 31 1986

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,
v.

RONALD PHILBROOK,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE SUPPORTING PETITIONERS**

MICHAEL H. GOTTESMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390

TABLE OF CONTENTS

	Page
ARGUMENT	2
Introduction and Summary	2
I. Title VII Does Not Require Employers To At- tempt To Accommodate Religious Observers' Desires To Be Compensated For The Pay They Lose When Absent From Work For Religious Reasons	5
II. Petitioners' Paid Leave Program Does Not Dis- criminate On The Basis Of Religion	12
CONCLUSION	17

TABLE OF AUTHORITIES

<i>Cases</i>	Page
Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), aff'd by equally divided Court, 402 U.S. 689 (1971)	8
NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979)	12
Riley v. Bendix Corp., 330 F. Supp. 583 (M.D. Fla. 1971), rev'd, 464 F.2d 1113 (5th Cir. 1972)	8
Thornton v. Caldor, Inc., — U.S. —, 105 S. Ct. 2914 (1985)	11, 12
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977)	2, 3, 5, 6, 10, 11, 14, 17
<i>Constitution</i>	
First Amendment, Establishment Clause	4, 10-12
<i>Statutes</i>	
Civil Rights Act of 1964, Title VII, as amended.....	<i>passim</i>
§ 701 (j), 42 U.S.C. § 2000e(j)	3-12
§ 703 (a) (1), 42 U.S.C. § 2000e-2 (a) (1)	3, 6, 12-17
<i>Legislative Materials</i>	
118 Cong. Rec. (1972)	8-10
<i>Regulations</i>	
EEOC Guidelines on Religious Discrimination:	
42 CFR § 1605.1 (1967)	6-7, 13
42 CFR § 1605.1 (1968)	7

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE SUPPORTING PETITIONERS**

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), with the consent of the parties, as provided for in this Court's rules. The AFL-CIO, a federation of 94 international and national labor organizations representing approximately 13 million working men and women, has a plain interest in this case, which will likely refine the test for determining when conduct by employers and unions violates Title VII of the Civil Rights Act of 1964's proscription of religious discrimination in the workplace.

ARGUMENT

Introduction And Summary

Respondent, a public-school teacher employed by petitioner Board of Education, belongs to a religion whose tenets dictate that he absent himself from work on certain religious holidays. Depending on the calendar, this obligation may require his absence on as many as six school days in the course of a school year.

The Board of Education, pursuant to a collective bargaining agreement, provides all teachers the right to take up to three days' leave *with pay* for religious observance. Additionally, in response to respondent's stated need for additional absences for religious observance, the Board has authorized him to take leave *without pay* for the additional days he needs. By this latter accommodation, the Board has removed entirely the dilemma that has confronted the religious observer in the usual run of cases, and that was the focus of this Court's opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), viz, whether a religious observer unable to conform to the employer's customary work requirements may for that reason be *discharged or otherwise denied employment*.

This case, instead, presents the question whether an employer who accommodates religious observers by allowing the observers to be absent when their religion requires has an *additional* duty to attempt to mitigate the adverse economic consequence to those who avail themselves of that opportunity and thereby miss certain days of work. Indeed, since the collective bargaining agreement here provides religious observers their pay for the first three days of religious absence, the precise question in this case is whether Title VII of the Civil Rights Act of 1964, as amended, requires the employer to provide compensation for the fourth through sixth days of such absence as well. But the same legal issue would be posed if an employer

authorized absence for religious observance without agreeing to pay for any of the days of absence.

The court below held that this question, like the question posed in *Hardison*, is governed by the "reasonable accommodation without undue hardship" standard of § 701(j) of Title VII.¹ That court held that if this employer, without "undue hardship," could have found a way to provide respondent some or all of the pay he lost on his fourth, fifth and sixth days of religious absence, Title VII obliged the employer to do so. The court below remanded the case to the district court for a determination pursuant to that standard.

It is our submission that the court below erred as a matter of law in holding that the "reasonable accommodation" standard applies to this situation. It is clear from the evolution of Title VII and from the sponsors' explanation of their purpose that the lone concern actuating passage of § 701(j) was a desire to protect employees in appropriate circumstances from *losing their jobs* because the employees were unable for religious reasons to conform to customary work requirements. Congress' con-

¹ Title VII's basic prohibition against religious discrimination, enacted in 1964, appears in Section 703(a) (1) of the Act, 42 U.S.C. § 2000e-2(a) (1):

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . .

In 1972, Congress amplified this prohibition by enacting Section 701(j), 42 U.S.C. § 2000e(j), which provides:

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's observance or practice without undue hardship on the conduct of the employer's business.

cern thus was that the few days of collision between religious needs and work requirements not foreclose religious observers from equal employment opportunity on all the other days during which the observers are ready and able to work. Congress' focus was *not* on subsidizing religious observance, but on assuring the observer equal treatment on the normal working days when his status is indistinguishable from that of other employees. By contrast, the court below would apply the "reasonable accommodation" standard to provide special protection to the religious observer *in his observance*; the court below would impose an obligation on the employer to attempt to accommodate the observer's desire to be paid for the days the observer is *not* working because of his religion.

The values that would be encompassed by a decision to require such subsidization of religious observance are qualitatively different from the values encompassed by a decision to assure religious observers an equal opportunity to compete on the days they are *not* observing their religion, and it would be wrong to attribute the former values to Congress in the absence of any evidence that Congress embraced them. And, because congressional imposition upon employers of an affirmative obligation to subsidize religious observance would pose more substantial Establishment Clause problems than does the obligation that Congress consciously imposed, there is all the more reason to steer clear of an interpretation that would impose that additional obligation absent evidence that Congress so intended.

Of course, if we are right that Congress imposed no *affirmative* obligation to accommodate religious observers' desires to avoid the loss of pay resulting from their absence from work, employers remain under the *negative* duty not to discriminate with respect to compensation on the basis of religion. Where an employer

has chosen to provide *paid* leave for designated purposes, the question may be posed whether that employer has discriminated against religious observance in selecting the kinds of absences for which such compensation is provided. The record of this case, however, presents no basis for a claim of such discrimination: the collective bargaining agreement here, in its provision on compensation for absence, has treated absence on religious grounds more favorably than all secular grounds for absence except illness and death in the immediate family.

I. Title VII Does Not Require Employers To Attempt To Accommodate Religious Observers' Desires To Be Compensated For The Pay They Lose When Absent From Work For Religious Reasons

The question presented here is whether an employer who accommodates religious observance by allowing an employee time off for such observance has an additional duty to attempt to mitigate the adverse economic consequence to the religious observer of absenting himself from work. *See* pp. 2-3 *supra*. For the reasons that follow, we do not believe that Congress can or should be understood to have imposed this additional duty.

The legislative history of § 701(j) reflects that the only concern prompting Congress to enact the "reasonable accommodation" obligation was to assure that employees would not be *denied employment altogether* because unable for religious reasons to meet particular employer work requirements, in those circumstances where the employer could without undue hardship reasonably adjust its work requirements to eliminate the barrier.²

² We do not discuss the separate question of whether the employer here was required to permit respondent time off for his religious observance. Even this is doubtful; doing so required the employer to employ a substitute teacher, with a resulting adverse effect on the quality of education provided the students, and *Hardison* strongly suggests that such an effect would constitute an "undue hardship." *See* 432 U.S. at 84 ("lost efficiency" constitutes undue

(1) As originally enacted in 1964, Title VII contained a prohibition on religious discrimination without the elaboration now provided by § 701(j). As this Court recounted in *Hardison*, that prohibition “soon raised the question of whether it was impermissible under § 703 (a) (1) to discharge or refuse to hire a person who for religious reasons refused to work during the employer’s normal workweek.” 432 U.S. at 72 (emphasis added).

In 1966, the Equal Employment Opportunity Commission promulgated a guideline to “deal[] with *this problem*,” *id.*; that guideline became the progenitor of § 701 (j). The guideline began by stating the context that had led the Commission to develop its “reasonable accommodation” standard:

Several complaints filed with the Commission have raised the question whether it is discrimination on account of religion to *discharge or to refuse to hire* a person whose religious observances require that he take time off during the employer’s regular work week. These complaints arise in a variety of contexts, but typically involve employees who regularly observe Saturdays as the Sabbath or who observe certain special holidays during the year. [29 CFR § 1605.1(a) (1) (1967), emphasis added.]

The EEOC concluded that § 703(a) (1) requires employers to reasonably accommodate religious needs “where such accommodation can be made without serious inconvenience to the business,” 29 CFR § 1605.1(a) (2) (1967), and then went on to suggest how employers might comply with that standard. The very first suggestion was the following:

An employer may permit absences from work on religious holidays, with or without pay, but must

hardship). If the employer were not required to provide any time off for religious observance, it would be difficult to conclude that, by reason of having chosen to permit such time off, the employer becomes obligated to attempt to accommodate respondent’s desire to be paid for this time.

treat all religions with substantial uniformity in this respect. However, the closing of a business on one religious holiday creates no obligation to permit time off from work on another. [29 CFR § 1605.1 (b) (1) (1967), emphasis added.]

In 1967, the EEOC amended this guideline. As in the 1966 guideline, the 1967 version began by reciting that the guideline was in response to complaints “rais[ing] the question whether it is discrimination on account of religion to *discharge or refuse to hire* employees” who are unwilling to work on days of religious observance. 29 CFR § 1605.1(a) (1968) (emphasis added). The 1967 guideline substituted the phrase “without undue hardship” for “without serious inconvenience” and specified that the employer has the burden of proving undue hardship. 29 C.F.R. § 1605.1(b), (c) (1978). The portion of the 1967 guideline allocating the burden of proof stated:

Because of the *particularly sensitive nature of discharging or refusing to hire* an employee or applicant on account of his religious beliefs, the employer has the burden of proving that an undue hardship renders the required accommodations to the religious needs of the employee unreasonable. [29 CFR § 1605.1(c) (1968) (emphasis added).]

Unlike the 1966 guideline, the 1967 version no longer contained suggestions as to how employers might comply, and thus the express authorization to permit absences “with or without pay” no longer appeared. But it is evident from the passages quoted above that the EEOC’s focus remained solely on insulating employees from job loss, and not on insulating employees against the salary loss resulting from absence for religious observance.

(2) Whether the EEOC’s guidelines, in construing the prohibition against discrimination in § 703(a) (1) to impose an affirmative duty of reasonable accommodation, correctly discerned the intent of the 1964 Congress was

a much-mooted question in the courts. In *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970)—a discharge case arising squarely within the ambit of the EEOC's guideline—the Sixth Circuit, in the course of an opinion upholding the discharge as lawful, expressed doubt that § 703(a)(1) created a duty of reasonable accommodation. 429 F.2d at 331 n.1. That doubt was not erased when this Court affirmed by an equally divided Court. 402 U.S. 689 (1971).

It was in this context that Senator Randolph, in 1972, proposed the amendment that became § 701(j), explaining that its purpose is to “resolve by legislation” the “uncertainty” existing in the courts. 118 Cong. Rec. 706 (1972). The text of Senator Randolph's amendment tracked the EEOC guidelines. And, like the EEOC guidelines and court decisions to which he referred in presenting his amendment,³ Senator Randolph's focus was exclusively upon insulating religious observers from job loss owing to inability to comply with employers' customary work requirements. His lone explanation of the need for his amendment was as follows:

I say to the distinguished chairman of the Labor and Public Welfare Committee, who manages this bill, that there has been a partial refusal at times on the part of employers *to hire or continue in employment* employees whose religious practices rigidly require them to abstain from work in the nature of hire on particular days. So there has been, because of understandable pressures, such as commitments of a family nature and otherwise, a dwindling of the membership of some of the religious organizations

³ Senator Randolph placed in the Congressional Record “the cases and regulations which are applicable to this issue”. 118 Cong. Rec. 706. He there included the 1966 and 1967 EEOC guidelines, the Sixth Circuit's opinion in *Dewey* and this Court's affirmance, and the opinion in *Riley v. Bendix Corp.*, 330 F. Supp. 583 (M.D. Fla. 1971) [later *rev'd*, 464 F.2d 1113 (5th Cir. 1972)]. *Riley*, like *Dewey*, involved a discharge for failure to conform to the employer's customary work requirements.

because of the situation to which I have just directed attention. [118 Cong. Rec. 705 (1972) (emphasis added).]

In the brief colloquy over the amendment, the only subject discussed was the extent of the accommodation in work schedules that could be required of employers consistent with the “undue hardship” standard, Senator Williams declaring “the amendment would permit the employer not to hire a person” if accommodation would impose undue hardship. 118 Cong. Rec. 706.

In sum, the legislative history reflects that the sole concern actuating Congress was that religious observers could be needlessly foreclosed from employment opportunities *altogether* simply because their religious convictions precluded their meeting the employer's customary work requirements on *some* occasions. Congress therefore placed an affirmative obligation on employers to adjust work requirements, where that could be done without undue hardship, as a means of enabling religious observers to keep their jobs without having to surrender their religious convictions. But there is nothing in the legislative history to suggest that Congress intended in addition to impose an affirmative obligation on employers to attempt to eliminate, or mitigate, the economic loss incurred by religious observers who forego work (and the attendant wages) on particular days in observance of their religious beliefs.⁴

⁴ Of course, while the congressional focus was on discharges and refusals to hire—those being the consequences religious observers were actually experiencing in the workplace because of their inability to conform to normal work schedules—the congressional concern would be equally applicable were an employer to penalize the need for religious absence in some lesser fashion, *e.g.* by visiting a disciplinary suspension encompassing a period in which the observer was available for work. The distinction is between hardships needlessly inflicted on religious observers when the observers are ready and able to work (the focus of Congress' attention) and the loss of income attributable to absence from work for religious reasons.

(3) For Congress to have imposed the latter obligation would have required an entirely different complex of value judgments than those actuating the former. The values Congress sought to accommodate by enacting § 701(j) were aptly stated by Justice Marshall, dissenting in *Hardison*: "a society that truly values religious pluralism cannot compel adherents of minority religions to make the cruel choice of surrendering their religion or their jobs". 432 U.S. at 87. See also, 118 Cong. Rec. 705-706 (remarks of Sen. Randolph). The interest Congress sought to promote thus was *not* insulation from the economic consequence of choosing to worship rather than work on a given day, but insulation from the loss of employment on *other* days when the employee would be ready and able to work. Protecting that interest was viewed as furthering the general anti-discrimination purpose of Title VII, for doing so enables the religious observer to be treated equally with all other persons on the days that the observer and non-observer are equally available for work.

By contrast, imposing an affirmative obligation on employers to attempt to find ways to recompense the religious observer for the wages he has foregone by opting for worship in lieu of available work is to place the weight of the government behind the subsidization of religious practice. Assuming *arguendo* that the Constitution would *permit* Congress to do this, but see pp. 10-11, *infra*, there is nothing in the legislative history of § 701(j) to suggest that Congress has *chosen* to do so, and a congressional decision to impose such an unusual obligation upon employers should not lightly be inferred.

(4) We have shown thus far that traditional modes of ascertaining legislative intent would lead to the conclusion that Congress did not intend results so foreign to the concern that actuated the passage of § 701(j) as that reached by the court below. That conclusion is

reinforced by the recognition that § 701(j), as construed by the court below, would be far more vulnerable to challenge under the Establishment Clause than the provision that Congress consciously adopted.

While this Court has not finally passed on the constitutional validity of § 701(j),⁵ it has been widely assumed that Congress has not transgressed the Establishment Clause by requiring employers, short of undue hardship, reasonably to accommodate work requirements in order that religious observers not be foreclosed altogether from employment.⁶ That assumption has been predicated on the proposition that Congress was not acting to facilitate religious practice, but merely to shield those with religious needs from foreclosure from the workplace on the occasions when the religious observers are ready and able to work. On this understanding of § 701(j), the focus of congressional concern is not on the days of religious worship but on the *other* working days when such observers are indistinguishable from all other employees or job applicants. Accordingly, any preference accorded the religious observer is merely an incidental effect of providing the observer the opportunity to compete equally with all other employees or job applicants.

The construction of § 701(j) by the court below, in contrast, would have it that Congress focused on ways to provide employees compensation for worshipping rather than working. Under either form of the compelled accommodation envisioned by the court below—furnishing the religious observer paid leave for his absence, or providing him other work on other days by which he can make up

⁵ See *Hardison*, 432 U.S. at 70 & n.4; *id.* at 89 (Marshall, J., dissenting); *Thornton v. Caldor, Inc.*, — U.S. —, 105 S. Ct. 2914, 2919 (1985) (O'Connor, J., concurring).

⁶ See, e.g., *Hardison*, 432 U.S. at 90-91, n.4 (Marshall, J., dissenting); *Thornton v. Calder*, 105 S. Ct. 2919 (O'Connor, J., concurring); and court of appeals decisions cited in the opinion of the court below, 757 F.2d at 487, n.11.

the lost pay⁷—Congress would be requiring employers to treat absence for religious purposes more favorably than those employers treat absences for legitimate secular necessities. And that preference would not be the incidental effect of attempting to preserve the religious observer's ability to compete equally with non-observers on *other* working days; it would, rather, reflect a congressional decision that religious absence is more deserving of compensation than absence necessitated by secular considerations.

On the view of the statute taken by the court below, the secular purpose ("antidiscrimination") that has been assumed to explain § 701(j) would be replaced by the purpose of fostering religion. *Cf. Thornton v. Caldor, supra*.⁸ In the absence of any evidence that Congress was actuated by that purpose, or intended § 701(j) to have the reach prescribed by the court below, it would be plainly inappropriate to construe § 701(j) in a manner that would pose serious constitutional questions. For there is lacking here "the affirmative intention of Congress clearly expressed" that is the prerequisite for concluding that Congress intended to tread so close to the impermissible line. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-501, 506-507 (1979).

II. Petitioners' Paid Leave Program Does Not Discriminate On The Basis Of Religion

While Congress did not intend by enacting § 701(j) to impose an *affirmative* obligation on employers to ac-

⁷ In this case, as the teacher is already obligated to teach on all teaching days, the other work of necessity would be non-teaching work that would otherwise have been performed by someone else.

⁸ Indeed, the constitutional question would be indistinguishable from that which would be posed were Congress to enact a statute providing that religious worshippers would be compensated from public funds for any wages lost by reason of voluntary absence from work for religious observance. For what Congress cannot do directly under the Establishment Clause, the Legislature cannot require employers to do.

commodate religious observers' desires to be compensated for pay lost on days the observers worship rather than work, Congress in § 703(a)(1) did impose a *negative* duty on employers not to "discriminate against any individual with respect to his compensation . . . because of such individual's . . . religion . . ."

(1) Employers who elect to provide paid leave for some purposes but not others may violate this duty if their choices constitute discrimination on the basis of religion. To take the simplest case, envisioned by the EEOC's 1966 guideline quoted *supra* at pp. 6-7, an employer who provides paid leave for religious observance to adherents of some religions but not others *would* violate Title VII.

(2) A more difficult question is whether an employer discriminates in violation of § 703(a)(1) by differentiating in its paid leave policies between absence for secular purposes and absence for religious purposes. It seems evident that an employer who authorizes its employees to take three days of paid leave each year "for any purpose whatever, so long as the leave time is not used for religious observance" *ought* to be held to be in violation of § 703(a)(1). Such employer conduct constitutes religious discrimination in the classic sense: having exhibited by its policy that it cares about neither the religious observer's absence nor the cost of paying for that absence, the employer is simply providing lesser benefits to those who, during their free time, choose to engage in religious observance than the employer provides to all its other employees.

A different answer is called for, however, when the employer does *not* provide "general purpose" paid leave which an employee can use for any purpose the employee chooses, but instead provides "special purpose" paid leave to be used only when a specified reason obtains. With respect to those cases, we agree with the court below, *see* 757 F.2d at 485, that an employer is entitled to provide paid leave for specified secular purposes (*e.g.*, illness,

death in the family, weddings, etc.) without thereby becoming obligated to provide paid leave for religious purposes as well. Such an employer is *not* singling out religious observers for disfavored treatment as compared to other employees. Indeed, were the rule otherwise—were an employer who provides “special purpose” paid leave for particular purposes required to provide paid religious leave as well—Title VII would have the effect of favoring religious interests over those secular interests for which the employer does not provide paid leave, a result at odds with the statutory purposes. *Hardison*, 432 U.S. at 84-85.

To be sure, there may be cases where an employer’s catalogue of compensable secular needs becomes so expansive that it approaches a “general purpose” paid leave policy that effectively excludes only religious observance. Those cases can be dealt with if and when they arise; it is sufficient that the instant case plainly is not in that category.

(3) The paid leave program of this employer is contained in a collective bargaining agreement and is set out at JA 94-95.⁹ Employees are authorized up to 18 days paid leave per year “for personal illness and/or illness in the immediate family,” and may accumulate unused sick leave from year to year up to a maximum of 180 days. The cumulated sick leave may also be used for other designated purposes in designated amounts, for example, up to five days for death in the immediate family, one day each for wedding or graduation attendance, one day for serving as an official delegate to a veterans or teachers organization, etc. In addition, employees are allowed up to three days of paid leave for “mandated religious observance,” and, unlike all other categories, these days

⁹ The indicated pages contain the paid leave provision in the 1978-1982 contract. The identical provision appears in the 1982-85 contract. JA 98-100. The provisions in contracts prior to 1978 are at JA 71-93.

are in addition to (and not charged to) the accumulated sick leave. Finally, three of the accumulated sick leave days are available for “necessary personal business.”

It is the last of these items that stirred the interest of the court below, which conjectured that these “necessary personal business” days might in practice be “general purpose” leave days from which religious observance is arbitrarily excluded. 757 F.2d at 485. The record, however, does not leave room for that conjecture.

On its face, the “necessary personal business” category is, as its title suggests, a limited-use provision, available only for personal “business” that is “necessary.” The collective bargaining agreement expressly states that leave in this category may *not* be claimed for “[a]ttendance or participation in a sporting or recreational event,” for “[t]ravel associated with any provision of annual leave,” or for other enumerated purposes, and further states that the enumerated prohibitions are not the only “limitations” on its availability. Additionally, the collective bargaining agreement states that leave in this category may not be claimed for any purpose for which leave is elsewhere specifically authorized (including religious observance), reflecting that the employer intended to limit its monetary exposure for each paid leave category to the number of days specified for that category. Finally, leave in this category is available only when the teacher is unable, despite “all reasonable efforts,” to “plan and conduct personal business so that it does not conflict with assigned professional business.”

The school superintendent testified without contradiction that the “necessary personal business” provision is monitored to assure that teachers receive paid leave only for the uses authorized, and that requests for such leave that do not fall within the ambit of the authorized uses are denied. JA 51-54, 61, 64-65, 145-146. That the “necessary personal business” provision is not in practice a

"general purpose" provision is demonstrated by the fact that in the school year preceding the trial only two of the 150 teachers in the school system had used all three days (JA 60) and most teachers had not used even one (P. Ex. 18).¹⁰

Plainly, the employer has not discriminated against religious observance in its paid leave policy. Only two uses are treated more favorably than religious observance: illness (18 days up to a cumulative total of 180 days) and death in the immediate family (5 days). The three-paid-day period for religious observance is as large as the days of pay allowed for any other use (indeed larger than most), and religious leaves are treated more favorably than all others in that they are not charged to accumulated sick leave. That the employer allows three days for other "necessary personal business," and does not allow those days to be used for *any* of the categories that are separately provided for, reflects no discrimination against religious observance, but merely an effort on the employer's part to contain its costs by limiting its monetary exposure for any particular use.¹¹

¹⁰ The collective bargaining agreement specifies that the first day of leave for "necessary personal business" will be "[g]ranted at the discretion of the [teacher]," while the second and third days must be "request[ed]" and "approv[ed]." This does not mean that the first day is a "general purpose" day that teachers may use at their whim; it means rather, as the superintendent testified, that teachers are trusted (as they are instructed) to use that day only for the authorized purposes (JA 64-65). The school board will dock a teacher who uses that day for an "unauthorized purpose" (JA 65). In practice, most teachers do not claim *any* days of leave for "necessary personal business" (P. Ex. 18).

¹¹ Accumulated leave that has not been used is forfeited when the employee's employment ends (JA 146). Additionally, leave cannot cumulate beyond 180 days, so that employees already at the maximum forfeit unused leave each year (JA 149). In consequence, the employer has a direct economic interest in limiting the uses and monitoring compliance therewith.

To require this employer to make the three "necessary personal business" days available for religious observance would not only increase its costs in a manner that the employer expressly sought to avoid, it would provide a preference for the religious over the secular that is contrary to the overall purpose of Title VII described in *Hardison*, 432 U.S. at 84-85. Employees are not permitted to enlarge the paid leave for specified secular uses by resorting to the "necessary personal business" provision, and Title VII's prohibition of discrimination on the basis of religion surely does not require that religious observance be afforded a privilege that is denied to all secular uses.

CONCLUSION

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

MICHAEL H. GOTTESMAN
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

DAVID M. SILBERMAN
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20036
(202) 637-5390

MAR 31 1986

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF AMICI CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL AND
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF THE PETITIONERS

AUGUST W. STEINHILBER
GWENDOLYN H. GREGORY
THOMAS A. SHANNON
National School
Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
WILLIAM S. FRANKLIN
McGUINNESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600

*Attorneys for Amicus Curiae
Equal Employment Advisory
Council*

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICUS CURIAE EQUAL EMPLOYMENT ADVISORY COUNCIL	1
INTEREST OF THE AMICUS CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION	3
STATEMENT OF THE CASE	4
SUMMARY OF ARGUMENT	7
ARGUMENT	9
I. A PLAINTIFF MAY NOT ESTABLISH A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII WHERE THE EMPLOYER HAS MADE REASONABLE ACCOMMODATION OF THE EMPLOYEE'S RELIGIOUS BELIEFS OR PRACTICES, AND HAS ALLOWED THE PLAINTIFF TO TAKE UNPAID LEAVES OF ABSENCE FROM WORK FOR RELIGIOUS OBSERVANCES	9
II. WHERE AN EMPLOYER HAS MADE REASONABLE ACCOMMODATIONS TO THE RELIGIOUS BELIEFS AND PRACTICES OF EMPLOYEES, TITLE VII DOES NOT REQUIRE THE EMPLOYER TO MAKE ANY AND ALL ADDITIONAL ACCOMMODATIONS PROPOSED BY AN EMPLOYEE, EVEN IF SUCH ACCOMMODATIONS WOULD NOT CAUSE UNDUE HARDSHIP TO THE EMPLOYER	14
A. Courts Can Determine Whether an Employer Has "Reasonably Accommodated" an Employee's Religious Practices Without Reference to the "Undue Hardship" Standard....	14

TABLE OF CONTENTS—Continued

	Page
B. Other Circuits Have Rejected the Panel's Proposed Approach, Under Which an Employer Always Would Have to Accept an Employee's Preferred Means of Accommodation Unless It Would Cause Undue Hardship to the Employer	17
C. The Decision Below Is Inconsistent With This Court's <i>Furnco</i> Decision and Reversal Would Preserve Traditional Management Prerogatives While Promoting Voluntary Efforts to Accommodate Employees' Religious Beliefs	23
CONCLUSION	26

TABLE OF AUTHORITIES

Cases:	Page
<i>Alexander v. Gardner-Denver Co.</i> , 415 U.S. 36 (1974)	26
<i>American Postal Workers Union, San Francisco Local v. Postmaster General</i> , 781 F.2d 772 (9th Cir. 1986)	8, 17, 18, 19, 22
<i>American Postal Workers Union v. Postmaster General</i> , 35 FEP Cases 1484 (N.D. Calif. 1984) ..	18
<i>Anderson v. General Dynamics Convair Aerospace Div.</i> , 648 F.2d 1247 (9th Cir. 1981), <i>cert. denied</i> , 454 U.S. 1145 (1982)	3
<i>Anderson v. General Dynamics Convair Aerospace Div.</i> , 589 F.2d 397 (9th Cir. 1978), <i>cert. denied</i> , 442 U.S. 921 (1979)	10-11, 12, 16
<i>Brener v. Diagnostic Center Hospital</i> , 671 F.2d 141 (5th Cir. 1982)	22
<i>Brown v. General Motors Corp.</i> , 601 F.2d 956 (8th Cir. 1979)	11, 12
<i>Chrysler Corp. v. Mann</i> , 561 F.2d 1282 (8th Cir. 1977), <i>cert. denied</i> , 434 U.S. 1039 (1978)	22
<i>EEOC v. Caribe Hilton International</i> , 597 F. Supp. 1007 (D.P.R. 1984)	11, 14
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978)	8, 23
<i>Gavin v. Peoples Natural Gas Co.</i> , 613 F.2d 482 (3rd Cir. 1980)	2
<i>Mann v. Milgram Food Stores, Inc.</i> , 730 F.2d 1186 (8th Cir. 1984)	20
<i>McDaniel v. Essex International, Inc.</i> , 571 F.2d 338 (6th Cir. 1978)	16
<i>Nottelson v. Smith Steel Workers D.A.L.U.</i> 19806, 643 F.2d 445 (7th Cir. 1981), <i>cert. denied</i> , 454 U.S. 1046 (1981)	2
<i>Philbrook v. Ansonia Board of Education</i> , 39 FEP Cases 1333 (D.Ct. 1984)	6
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985)	6, 7, 10, 11, 12, 14-15, 16, 22
<i>Pinsker v. Joint District Number 28J of Adams and Arapahoe Counties</i> , 735 F.2d 388 (10th Cir. 1984)	7, 12, 13, 15, 19-20

TABLE OF AUTHORITIES—Continued

	Page
<i>Redmond v. GAF Corp.</i> , 574 F.2d 897 (7th Cir. 1978)	11, 12, 22
<i>Stern v. Teamsters "General" Local Union No. 200</i> , 39 FEP Cases 1526 (E.D.Wis. 1986), <i>appeal docketed</i> , No. 86-1224 (7th Cir., Feb. 13, 1986)	20-21
<i>Texas Department of Community Affairs v. Burdine</i> , 450 U.S. 248 (1981)	24
<i>Thornton v. Caldor, Inc.</i> , 105 S.Ct. 2914 (1985)	2
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	2, 10, 25
<i>Turpen v. Missouri-Kansas-Texas Railroad Co.</i> , 736 F.2d 1022 (5th Cir. 1984)	10, 12, 22
<i>United States v. City of Albuquerque</i> , 545 F.2d 110 (10th Cir. 1976), <i>cert. denied</i> , 433 U.S. 909 (1977)	25
<i>United Steelworkers of America v. Weber</i> , 443 U.S. 193 (1979)	24
<i>W.R. Grace & Co. v. Local 759</i> , 461 U.S. 757 (1983)	26
<i>United States Constitution:</i>	
Amendment 1	4, 6
<i>Statutes:</i>	
Civil Rights Act of 1964, Title VII, as amended, 42 U.S.C. § 2000e <i>et seq.</i>	<i>passim</i>
Section 701 (j), 42 U.S.C. § 2000e(j)	9, 10, 15, 22
Section 703 (a), 42 U.S.C. § 2000e-2(a)	9, 15
National Labor Relations Act, as amended, 29 U.S.C. § 151 <i>et seq.</i>	21
Section 19, 29 U.S.C. § 169	21
<i>Regulations:</i>	
29 C.F.R. § 1605	3
29 C.F.R. § 1605.2(c) (2)	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION, *et al.*,
v. *Petitioners,*

RONALD PHILBROOK,
Respondent.

On a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF AMICI CURIAE OF THE
EQUAL EMPLOYMENT ADVISORY COUNCIL AND
THE NATIONAL SCHOOL BOARDS ASSOCIATION
IN SUPPORT OF THE PETITIONERS

The Equal Employment Advisory Council (EEAC) and the National School Boards Association (NSBA), with the written consent of all parties, respectfully submit this brief as amici curiae in support of the petitioners.¹

INTEREST OF THE AMICUS CURIAE
EQUAL EMPLOYMENT ADVISORY COUNCIL

EEAC is a voluntary, nonprofit association organized to promote the common interest of employers and the general public in sound government policies,

¹ The consents of all parties have been filed with the Clerk of the Court.

procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations. Its governing body is a board of directors composed primarily of experts and specialists in the field of equal employment opportunity, whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

EEAC members are either employers or associations of employers that are subject to the requirements of Title VII of the Civil Rights Act of 1964 and related regulations. Accordingly, EEAC has a vital interest in the issue here before this Court, namely, whether Title VII requires an employer that already has made reasonable accommodation of the religious beliefs and practices of its employees, to make further accommodations proposed by an employee if the employee's proposed accommodations would not cause "undue hardship" to the employer's business.

Because of its interest in the religious accommodation requirements of Title VII, EEAC has filed numerous briefs amicus curiae in this Court and in the United States Courts of Appeals in cases interpreting those provisions. *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977); *Thornton v. Caldor, Inc.*, 105 S.Ct. 2914 (1985); *Gavin v. Peoples Natural Gas Co.*, 613 F.2d 482 (3rd Cir. 1980); *Nottelson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046

(1981); and *Anderson v. General Dynamics Convair Aerospace Div.*, 648 F.2d 1247 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982).²

INTEREST OF THE AMICUS CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION

Amicus Curiae, National School Boards Association (NSBA), is a nonprofit federation of this nation's state school boards associations, the District of Columbia school board and the school boards of the offshore flag areas of the United States. Established in 1940, NSBA is the only major national educational organization representing school boards and their members. Its membership is responsible for the education of more than ninety-five percent of the country's public school children.

The individuals who compose the school boards of this country are elected or appointed community representatives. They are responsible under state law for the fiscal management, staffing, continuity and educational productivity of the public schools within their jurisdictions.

The funding for salaries and other expenses of the school district comes directly from public moneys, including state and federal funds and local property taxes. School boards have a duty to the taxpayers to assure that all activities are conducted in the most administratively sound and cost effective manner. That is not to say that the civil rights of both em-

² Because of its concerns with the legal and practical problems inherent in EEOC's approach to religious accommodation, EEAC filed extensive comments with EEOC regarding that agency's "Proposed Guidelines on Discrimination Because of Religion." See 29 C.F.R. § 1605 (1980).

employees and students are not of serious concern to boards. However, a balance must be struck between the rights of employees and the needs of the district in serving its students. School district operations are extremely labor intensive, and there are few teachers or other employees whose duties can remain unattended during operating hours. It should be the sole province of the school district to select the reasonable accommodation of its employees' religious beliefs and practices, which causes the least disruption of the educational process. To require otherwise would seriously erode the management prerogatives of school boards.

Congress did not intend by its "reasonable accommodation" language to allow employees to dictate to their employer the means of the accommodation. Unlike private employers, school districts are bound by both religion clauses of the first amendment: first, to accommodate the "free exercise" interests of their employees and second, to assure that accommodation does not go so far as to result in establishment of religion. If the decision below is affirmed, school districts will find it even more difficult to walk that precarious line between the two religion clauses.

STATEMENT OF THE CASE

Respondent Ronald Philbrook has been employed by Petitioner Ansonia Board of Education ("the Board") as a teacher at Ansonia High School since 1962. Since 1968, Philbrook has been a member of the Worldwide Church of God, which requires its members to abstain from secular employment on certain holy days. Because several of those holy days usually fall on school days, Philbrook is required to miss about six school days per year.

Since the late 1960's, collective bargaining agreements between the Board and the Ansonia Federation of Teachers, the union that represents Philbrook and other Ansonia teachers, have provided for three days of paid annual leave for observance of religious holidays. The contracts provide additional days (currently 18) of paid leave for illness and other purposes, including three days for "necessary personal business." The contract, however, prohibits use of these personal business leave days for various specified purposes, including religious observances and any other purpose for which paid leave is otherwise provided. (Pet. App. 5a, n.2).

In order to accommodate Philbrook's need for additional days off to observe his church's holy days, the Board has consistently allowed him to take unpaid leave over and above the three days of paid leave provided under the contract. Philbrook, however, has requested additional accommodations. First, he has asked to be allowed to use paid personal business leave for religious observances. In the alternative, he has offered to pay the cost of hiring a substitute instead of being required to take unpaid leave.³ In addition, he has offered to supervise the substitutes and to work at other times to make up for his unauthorized absences. The Board, however, has rejected both proposals.

Philbrook filed suit in the United States District Court for the District of Connecticut, alleging that the Board's policy of not allowing personal business leave to be used for religious observances constituted religious discrimination in violation of Title VII, and

³ In 1984, a substitute cost \$30 per day, while Philbrook's salary would have been docked over \$130 for each day of unpaid leave.

also violated the free exercise clause of the First Amendment. After a trial, the district court found for the Board. *Philbrook v. Ansonia Board of Education*, 39 FEP Cases 1333 (D.Ct. 1984).

On appeal, a divided panel of the United States Court of Appeals for the Second Circuit reversed. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985). The panel majority held that Philbrook had established a prima facie case of religious discrimination under Title VII, by showing that he had informed the Board of his need for additional leave on holy days, and that he suffered a detriment (loss of pay) because of the conflict between his religious practices and the Board's employment requirements. *Id.* at 482. The panel also found that the Board had not successfully rebutted the prima facie case. Although it found the Board's policy of providing three days of paid leave, and additional days of unpaid leave, for religious services to be reasonable, the panel ruled that the Board still had to demonstrate that it could not comply with Philbrook's proposed accommodations without undue hardship. *Id.* at 484-485. The panel held that "Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the *employee prefers* unless that accommodation causes undue hardship on the employer's conduct of his business." *Id.* at 484 (emphasis added). The court of appeals remanded the case to the district court for a determination of whether either of Philbrook's proposed accommodations would cause undue hardship to the Board. *Id.* at 485.⁴

⁴ The Court of Appeals did not rule on the First Amendment issue, and that issue has not been presented on this appeal.

Judge Pollack filed a vigorous dissent in which he noted that the Board's policy neither made distinctions among employees nor denied Philbrook the opportunity to work or to observe his church's holy days. 757 F.2d at 488. Judge Pollack also observed that the Board had made reasonable accommodation of Philbrook's religious practices, and drew attention to *Pinsker v. Joint District Number 28J of Adams and Arapahoe Counties*, 735 F.2d 388 (10th Cir. 1984), in which the Tenth Circuit rejected the suggestion that Title VII requires an employer that has made reasonable accommodations to adopt a leave policy that is less burdensome to an employee's religious practices. 757 F.2d at 489.

SUMMARY OF ARGUMENT

The panel majority below erred in holding that Philbrook had established a prima facie case of religious discrimination against the Board. To establish a prima facie case, a plaintiff must show that his religious beliefs or practices conflicted with the employer's work requirements, and that he was disciplined, discharged, or otherwise denied some benefit or privilege of employment for failing to comply with the conflicting work requirement. Philbrook's religious practices, however, did not conflict with the Board's employment requirements. To the contrary, the Board not only allowed him to take as much leave as he needed for religious observances, but also, under the terms of its collective bargaining contract, afforded him the first three days of such leave each year *with pay*—a benefit not enjoyed by other employees who did not take religious leave.

Moreover, Philbrook was not discharged, disciplined or denied any benefit or privilege that he would have

received but for his religious beliefs. The Board allowed him to take leave without pay over and above the three days per year of paid leave for religious observances to which all employees were entitled under the collective bargaining agreement. When he took such unpaid leave, he was not being "disciplined," but merely was not receiving pay for days on which he did not work. He remained eligible for all the same contractually-specified amounts of paid leave for personal business, illness, and other purposes as all other employees.

Even if Philbrook is viewed as having established a prima facie case, however, the panel still erred in holding that the Board was required by Title VII to accept Philbrook's proposed accommodations if they did not cause the Board undue hardship, since the court had found the Board's leave policy to be a reasonable accommodation of Philbrook's religious beliefs. *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986). Title VII requires employers to make reasonable accommodations of employees' beliefs or to demonstrate inability to make such accommodations without undue hardship. Where, as here, an employer is found to have reasonably accommodated an employee's religious practices, the Title VII inquiry ends, because the employer has fulfilled its duty to accommodate. Where an employer has implemented nondiscriminatory employment practices that advance its legitimate business goals, Title VII has not been violated, and courts may not step in and restructure the employer's practices. *Cf. Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978). Reversal of the decision below will encourage employers to adopt voluntary measures to accommodate employees' reli-

gious beliefs and thereby will promote the goal of achieving voluntary compliance with the requirements of Title VII.

ARGUMENT

I. A PLAINTIFF MAY NOT ESTABLISH A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION UNDER TITLE VII WHERE THE EMPLOYER HAS MADE REASONABLE ACCOMMODATION OF THE EMPLOYEE'S RELIGIOUS BELIEFS OR PRACTICES, AND HAS ALLOWED THE PLAINTIFF TO TAKE UNPAID LEAVES OF ABSENCE FROM WORK FOR RELIGIOUS OBSERVANCES.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, prohibits employers from discriminating against employees on the basis of religion, 42 U.S.C. § 2000e-2(a), unless an employer demonstrates that it cannot "reasonably accommodate" an employee's religious observances or practices without "undue hardship" to the employer's business. 42 U.S.C. § 2000e(j).⁵ Although neither Title VII nor its leg-

⁵ Section 703(a) of the Civil Rights Act provides that:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion . . . ; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's . . . religion. . . .

42 U.S.C. § 2000(e)-2(a). Section 701(j) of the Act qualifies § 703(a)'s proscription of religious discrimination as follows:

islative history indicates the degree to which an employer must accommodate the religious practices of employees, see *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74-75 (1977), this Court has held that the duty to accommodate does not require employers to take steps inconsistent with otherwise valid collective bargaining agreements. *Id.* at 79. The Court in *Hardison* also held that Title VII does not require employers to discriminate against some employees in order to accommodate the religious beliefs or practices of other employees. *Id.* at 81. Finally, the Court in *Hardison* ruled that an accommodation imposing more than a *de minimis* cost on the employer constitutes an "undue hardship." *Id.* at 84 (footnote omitted).

The panel below set forth a proper statement of the plaintiff's prima facie burden of proof in a discrimination case under Title VII:

A plaintiff in a [Title VII] case makes out a prima facie case of religious discrimination by proving: (1) he or she has a bona fide religious belief that conflicts with an employment requirement; (2) he or she informed the employer of this belief; (3) he or she was disciplined for failure to comply with the conflicting employment requirement.

757 F.2d at 481. See also *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair*

The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j).

Aerospace Div., 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979). The panel majority erred, however, in concluding that Philbrook had "almost certainly" satisfied this prima facie standard. 757 F.2d at 481.

Assuming, as amici do, that Philbrook's religious beliefs are genuine, the panel majority erred in two respects in finding that he had established a prima facie case of religious discrimination under the test set forth above. First, the Board's employment requirements simply did not conflict with Philbrook's religious beliefs and practices. Far from it: whenever Philbrook has needed to be absent from work for religious observances, he has always been allowed to do so. Indeed, under the collective bargaining agreement, Philbrook has taken the first three days of such absences each year *with pay* and enjoyed three more paid days off than nonreligionist employees. Although he was required to take unpaid leave for additional days of religious observances, the fact remains that the Board's requirements did not conflict with Philbrook's need to be absent on those days.

Second, Philbrook was not "disciplined for failure to comply with the conflicting employment requirement." 757 F.2d at 481. "Discipline," in the employment context, suggests some form of punishment for failing to observe an employer's rules or policies. The term scarcely can be stretched so far as to cover the Board's declining to pay Philbrook for *all* of his absences on holy days.⁶ Perhaps for that reason, the

⁶ An employer, after all, is under no obligation to pay employees for work they do not perform for religious reasons. *EEOC v. Caribe Hilton International*, 597 F. Supp. 1007, 1012 (D.P.R. 1984).

majority later characterized Philbrook as having “suffered a detriment”—not as having been disciplined—because his religious beliefs conflicted with the Board’s employment requirements. 757 F.2d at 482. Upon examination, however, the “detriment” the majority perceived becomes illusory. Philbrook received pay for every day he worked and for as many days on which he missed work for religious reasons as any other employee was entitled to receive. He likewise remained eligible to take as many days off with pay for non-religious personal business, illness, and other contractually-sanctioned purposes as any other employee. Thus, in no meaningful sense was he placed at a detriment relative to other employees because of his religion.

Indeed, the panel’s holding strays even farther from its supporting case law than the above analysis indicates. *Turpen, Brown, Anderson and Redmond*, on which the panel based its analysis of the prima facie case, all involved employees that were *discharged* because of the alleged incompatibility of their religious beliefs and their employers’ work requirements. It surely is a far cry from those discharge cases to the situation before this Court, in which Philbrook not only has not been fired, but has been given as much leave as he needed for religious observances, and actually has been *paid* for the first three days of such leave every year.

In a recent decision involving strikingly similar facts, the Tenth Circuit Court of Appeals held that a school district had not violated Title VII, even though its religious leave policy was less favorable to employees than that of the Board. *Pinsker v. Joint District Number 28J of Adams and Arapahoe Counties*, 735 F.2d 388 (10th Cir. 1984). In *Pinsker*, a Jewish

school teacher claimed that the school district had violated Title VII by providing a maximum of two days paid annual leave for observance of Jewish holidays. In some years three Jewish holidays fell on school days, and the plaintiff had to use one day of unpaid leave in those years for religious observances.

The Tenth Circuit rejected the plaintiff’s contention that the school district was required by Title VII to institute a leave policy that would be less burdensome to his religious practices. The court held that the plaintiff had not made out a prima facie case of discrimination:

Defendant’s policy and practices jeopardized neither Pinsker’s job nor his observance of religious holidays. Because teachers are likely to have not only different religions but also different degrees of devotion to their religions, *a school district cannot be expected to negotiate leave policies broad enough to suit every employee’s religious needs perfectly*. Defendant’s policy, although it may require teachers to take occasional unpaid leave, is not an unreasonable accommodation of teachers’ religious practices. Thus, the trial court correctly determined that *plaintiff did not make a prima facie showing of discrimination*.

735 F.2d at 391 (emphasis added).

Amici submit that the Tenth Circuit’s reasoning in *Pinsker* should be followed by this Court. Like the plaintiff in *Pinsker*, Philbrook has not been forced to choose between his job and the observance of his church’s holy days. The leave policy in question here has removed any potential conflict between the Board’s employment requirements and Philbrook’s religious needs. Moreover, Philbrook has not been deprived of

any benefit or privilege of employment by the Board because of his religious practices. He simply has not been paid for *some* (but not *all*) of the holy days on which he did not work. See *EEOC v. Caribe Hilton*, *supra* n.6. Accordingly, the panel should not have found that Philbrook had established a *prima facie* case of religious discrimination.

II. WHERE AN EMPLOYER HAS MADE REASONABLE ACCOMMODATIONS TO THE RELIGIOUS BELIEFS AND PRACTICES OF EMPLOYEES, TITLE VII DOES NOT REQUIRE THE EMPLOYER TO MAKE ANY AND ALL ADDITIONAL ACCOMMODATIONS PROPOSED BY AN EMPLOYEE, EVEN IF SUCH ACCOMMODATIONS WOULD NOT CAUSE UNDUE HARDSHIP TO THE EMPLOYER.

A. Courts Can Determine Whether an Employer Has "Reasonably Accommodated" an Employee's Religious Practices Without Reference to the "Undue Hardship" Standard.

Even if the panel were correct in holding that Philbrook had established a *prima facie* case, it still erred in ruling that the Board violated Title VII by refusing to accommodate Philbrook's religious needs in precisely the manner he requested. As noted, the panel majority agreed with the Board that the Board's policy of affording three days of paid leave and additional days of unpaid leave for religious observances was a reasonable accommodation of Philbrook's religious beliefs and practices. 757 F.2d at 484. The panel went on to declare, however, that the Board's duty to accommodate "cannot be defined without reference to undue hardship," *id.*, and that

Where the employer and the employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the

employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business.

Id. (emphasis added). This broad proposition is unsupported by case law—indeed, is contrary to case law—and if affirmed would expand impermissibly the scope of employers' duty to accommodate their employees' religious beliefs and practices under Title VII.

To begin with, the court's assertion that "the duty to accommodate . . . cannot be defined without reference to undue hardship" is simply wrong. Sections 703(a) and 701(j), read together, provide that an employer may not discriminate against any individual because of his religion, "unless an employer demonstrates that he is unable to reasonably accommodate to an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. §§ 2000e-2(a), 2000e(j). The clear import of this proviso is that an employer that *does* "reasonably accommodate" such practices does not violate Title VII. In such circumstances, the issue of "undue hardship" simply does not arise, because the employee's religious practices have been accommodated. Only if the employer does not reasonably accommodate the employee would the issue of "undue hardship" even be addressed.

The Tenth Circuit has recognized the common sense proposition that "[s]imply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer." *Pinsker*, *supra*, 735 F.2d at 390 (citation omitted; emphasis added). Similarly, the Sixth Circuit has held that "§ 701(j) requires that a rea-

sonable accommodation be made or a showing that to do so would work an undue hardship." *McDaniel v. Essex International, Inc.*, 571 F.2d 338, 341 (6th Cir. 1978) (emphasis added). Likewise, the Ninth Circuit has stated that it is the employer's burden to show that it made good faith efforts to accommodate the employee's religious beliefs and, *if those efforts were unsuccessful*, to demonstrate inability to reasonably accommodate those beliefs without undue hardship. *Anderson, supra*, 589 F.2d at 401 (citation omitted).⁷

⁷ The panel majority relied on regulations issued by the Equal Employment Opportunity Commission (EEOC) in support of its suggested approach. 757 F.2d at 485. Those regulations, found at 29 C.F.R. § 1605.2(c) (2) provide that:

When there is more than one method of accommodation available which *would not cause undue hardship*, the Commission will determine whether the accommodation offered is *reasonable* by examining:

- (i) The alternatives for accommodation considered by the employer or labor organization; and
- (ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities [sic], such as compensation, terms, conditions, or privileges of employment. *Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.* (Emphasis added.)

The EEOC regulations, however, suffer from the same infirmity as the panel majority's reasoning—they put the cart before the horse. As noted, Title VII requires reasonable

B. Other Circuits Have Rejected the Panel's Proposed Approach, Under Which an Employer Always Would Have to Accept an Employee's Preferred Means of Accommodation Unless It Would Cause Undue Hardship to the Employer.

The panel's proposed approach was explicitly rejected in a recent decision of the Ninth Circuit Court of Appeals. *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772 (9th Cir. 1986). In that case, the plaintiffs were Postal Service window clerks whose religious beliefs precluded them from processing draft registration materials. A Postal Service regulation, however, required window clerks to process such materials or, in the event of a religious conflict, to transfer to a position that did not require such processing. The right to transfer was contained in a collective bargaining agreement, and the Postal Service declined to make any other accommodations. *Id.* at 774.

The plaintiffs sued the Postmaster General, claiming that the Postal Service violated Title VII by refusing to allow them to remain in their positions as window clerks and to refer draft registrants to other such clerks, rather than having to handle draft registration materials or transfer to other positions. The district court found for the plaintiffs. Assuming that the opportunity to transfer constituted "reasonable accommodation," the court ruled that because the plaintiffs considered that accommodation "wholly inadequate," the Postal Service was required to implement the plaintiffs' proposal unless it would constitute

accommodation or a demonstration that reasonable accommodation cannot be made without undue hardship. If, as in this case, reasonable accommodation *has been made*, the issue of undue hardship never arises.

undue hardship. *American Postal Workers Union v. Postmaster General*, 35 FEP Cases 1484, 1488 (N.D. Calif. 1984). Because it found that the plaintiffs' proposed accommodation would not cause undue hardship, the district court held that the Postal Service had violated Title VII. *Id.* at 1488.

The Ninth Circuit (per curiam) reversed, explaining that the district court had failed to distinguish between situations in which the employer's accommodation effectively eliminates an employee's religious conflict, and those in which the employer's accommodation fails to eliminate that conflict. 781 F.2d at 776. The court of appeals found that the Postal Service's proposed accommodation effectively eliminated the plaintiffs' religious conflicts, and that the plaintiffs rejected that accommodation "not because the transfer failed to eliminate their religious conflict, but because they believed the accommodation would place them in a less attractive employment status." *Id.* The court held that:

The position advanced by [plaintiffs] stands for the proposition that an employer must accept any accommodation, short of "undue hardship," proposed by an employee, regardless of whether the employee rejects an accommodation proposed by the employer solely on secular grounds. *Title VII does not compel that conclusion.*

Id. (emphasis added). The court went on to hold that an employer need implement the employee's accommodation (assuming that it does not involve undue hardship) *only* if the *employer's* proposed accommodation *fails to eliminate the employee's religious conflict*:

Where an employer proposes an accommodation which effectively eliminates the religious

conflict faced by a particular employee, however, the inquiry under Title VII reduces to whether the accommodation reasonably preserves the affected employee's employment status.

Id. at 776-777. The court of appeals ruled that the district court had erred in requiring the employer to accept the employees' proposed accommodation unless that accommodation would cause undue hardship, and remanded the case to the district court for a determination whether the Postal Service's proposed accommodation would reasonably preserve the plaintiffs' employment status. *Id.* at 777.

The Ninth Circuit's analysis in *Postal Workers* demonstrates clearly that the Board has discharged its duty of reasonable accommodation in this case. Its leave policy has, beyond question, eliminated Philbrook's perceived religious conflict. Moreover, Philbrook's employment status not only has been "reasonably preserved," but has not been affected at all. Accordingly, the Board has satisfied its obligation under Title VII, and it was improper for the panel to address the issue of whether Philbrook's proposals would involve undue hardship.

At least two other courts of appeals have implicitly rejected the approach taken by the panel majority in this case. In *Pinsker, supra*, the Tenth Circuit ruled that the school district had reasonably accommodated the plaintiff's religious practices by affording two days of *paid* leave, and an additional day of unpaid leave, for religious observances. The court of appeals rejected the plaintiff's contention that the district should institute a more favorable leave policy (for example, by allowing all teachers additional days for religious leave or by permitting teachers to make up

religious leave by doing other work). 735 F.2d at 390. The court observed that:

Title VII requires reasonable accommodation. *It does not require employers to accommodate the religious practices of an employee in exactly the way the employee would like to be accommodated. Nor does Title VII require employers to accommodate an employee's religious practices in a way that spares the employee any cost whatsoever.*

Id. at 390-391 (citations omitted; emphasis added). Having found that the school district had reasonably accommodated the plaintiff, the court did not require the school district to show that the employee's proposed additional accommodations would pose an undue hardship.

Likewise, in *Mann v. Milgram Food Stores, Inc.*, 730 F.2d 1186 (8th Cir. 1984), the Eighth Circuit affirmed a district court decision that an employer that had made reasonable efforts to accommodate an employee's religious beliefs before discharging him had not violated Title VII. The court of appeals held that "Neither the fact that Mann made alternative accommodation suggestions nor that Milgram's did not accept those suggestions establishes that the district court's findings in this regard are clearly erroneous." *Id.* at 1189 (footnote omitted). Again, the court did not require the employer, which had reasonably accommodated the employee, to demonstrate that the employee's proffered accommodations would have meant undue hardship to the employer's operations.

To similar effect is the district court decision in *Stern v. Teamsters "General" Local Union No. 200*,

39 FEP Cases 1526 (E.D. Wis. 1986), *appeal docketed*, No. 86-1224 (7th Cir., February 13, 1986). In that case, the court held that an employer and union had reasonably accommodated an employee whose religious beliefs prevented him from joining or financially supporting the union, by allowing him to pay the equivalent of union dues to a nonreligious charity. *Id.* at 1529. The court found no violation of Title VII even though the employee had sought instead to be allowed to pay the equivalent of union dues to a religious broadcaster. *Id.* The court granted summary judgment to the employer and union because they had offered the employee a reasonable accommodation that he refused to accept. *Id.*⁸

In addition, several courts of appeals have ruled that an employee seeking accommodation of his religious practices must try to reconcile the requirements of his faith with the employment requirements of his employer *through means provided by the employer*. As the Fifth Circuit has explained:

Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the

⁸ In *Stern*, the accommodation offered by the employer and union was of the kind explicitly sanctioned in a 1980 amendment to the National Labor Relations Act. See 29 U.S.C. § 169. The logic of the *Stern* decision, however, is not limited to instances in which Congress has specifically approved of certain kinds of accommodation. Rather, it is that where (because of Congressional approval or other reasons) an employer's proposed accommodation is found to be *reasonable*, Title VII does not require the employer to accept an employee's alternative proposal, even if the latter would not involve undue hardship.

employer. A reasonable accommodation need not be on the employee's terms only.

Brener v. Diagnostic Center Hospital, 671 F.2d 141, 146 (5th Cir. 1982) (footnote omitted). See also *Postal Workers*, *supra*, 781 F.2d at 777; *Chrysler Corp. v. Mann*, 561 F.2d 1282, 1285-86 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978); *cf. Redmond v. GAF Corp.*, *supra*, 574 F.2d at 901-902.

Those decisions clearly reject the panel's approach, under which an employee would have no duty to attempt to satisfy his needs by means of the employer's procedures, no matter how reasonable those procedures might be. As the Ninth Circuit has explicitly recognized, the approach suggested by the panel majority in this case

would have the effect of shifting the entire responsibility for accommodation to the employer, by granting an employee the unequivocal right to have every alternative assessed under the "undue hardship" standard. Such a result runs contrary to the basic premise of § 701(j), *i.e.*, mutual cooperation.

Postal Workers, *supra*, 781 F.2d at 777.⁹

⁹ *Brener v. Diagnostic Center Hospital* and *Turpen v. Missouri-Kansas-Texas Railroad Co.*, relied on by the majority, offer little support for its approach. As noted *supra*, the Fifth Circuit's emphasis in *Brener* on the employee's duty to seek accommodation through means offered by the employer, *see* 671 F.2d at 145-146, is incompatible with the panel's approach.

The panel also cited a reference in *Turpen* to the "interlocking" nature of the "reasonable accommodation" and "undue hardship" provisions of § 701(j). 757 F.2d at 484. The Fifth Circuit's reference was made, however, only in passing, and then in an entirely different context from the one presented in this case. *See* 736 F.2d at 1026.

C. The Decision Below Is Inconsistent with This Court's *Furnco* Decision and Reversal Would Preserve Traditional Management Prerogatives While Promoting Voluntary Efforts to Accommodate Employees' Religious Beliefs.

The panel majority's proposed approach also is incompatible with reasoning previously employed by this Court. In *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978), a case involving the validity of an employer's hiring procedures under Title VII, the Court ruled that the employer was required to show only that employment decisions were based on legitimate considerations (and not on race), and were made to enable the employer to achieve business goals. *Id.* at 577. The Court rejected the suggestion that Title VII required the employer to adopt hiring procedures that would maximize the hiring of minorities. *Id.* at 577-578. In ruling that Title VII does not allow courts to second-guess employers' legitimate, nondiscriminatory business decisions, the Court noted that "Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it." *Id.* at 578.

The Court's reasoning in *Furnco* applies with equal force in this case. Where an employer such as the Board has reasonably accommodated the religious needs of employees, it is not required to make additional accommodations proposed by employees, even if such accommodations would not involve undue hardship. The plain meaning of *Furnco* is that it is the purpose of Title VII to prevent employment discrimination, not to allow courts and agencies to tinker at will with employers' legitimate, nondiscriminatory practices.

The majority's approach, moreover, would undercut the clearly expressed intention of Congress in enacting Title VII that management prerogatives not be unnecessarily interfered with. This Court in *United Steelworkers of America v. Weber*, 443 U.S. 193, 206 (1979), noted that:

Title VII could not have been enacted into law without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business. Those legislators demanded as a price for their support that "management prerogatives, and union freedoms . . . be left undisturbed to the greatest extent possible." (Citation omitted.)

In *Weber*, *id.* at 207, the Court further cautioned that Congress did not intend Title VII to "diminish traditional management prerogatives" or "to limit traditional business freedom." See also *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981). Under the panel's approach, however, management's traditional prerogative to set and enforce leave policies would be replaced to a significant extent by a system of ad hoc leave policies dictated largely by employees.

Finally, the panel's approach, if adopted, could discourage employers and school boards from voluntarily adopting policies designed to accommodate employees' religious practices. Currently, many employers unilaterally, or in collective bargaining agreements with unions, establish policies and procedures under which employees' religious needs may be accommodated. Such procedures, in addition to formal provisions of leave for religious observances, include arrangements for voluntary swaps of shifts or overtime work among employees, flexible scheduling, and transfers and reas-

signments to jobs that do not require work on employees' holy days. Most collective bargaining agreements contain seniority provisions, which this Court has held can represent "significant accommodation" to both the religious and secular needs of employees. *Hardison*, *supra*, 432 U.S. at 78. See also *United States v. City of Albuquerque*, 545 F.2d 110, 113-114 (10th Cir. 1976), *cert. denied*, 433 U.S. 909 (1977) (reasonable accommodations embodied in fire department's rules and regulations).

Should the panel majority's approach be adopted, however, the incentive for employers and unions voluntarily to anticipate the religious needs of employees and to fashion policies to accommodate those needs would be greatly diminished. Having been put in the onerous position of having, in effect, to negotiate a separate accommodation for every employee whose religion may require accommodation, many employers may decide not even to attempt to adopt an accommodation policy generally applicable to all employees, but rather may deal with the issue on an ad hoc basis. One unfortunate consequence could be that employees who were unaware of their rights under Title VII, and hence did not seek accommodation of their beliefs, might receive no accommodation at all.

If the panel's approach is rejected, on the other hand, employers still will have a significant incentive to attempt voluntarily to accommodate employees' religious practices. Employers will be encouraged to formulate policies likely to be upheld as "reasonable" accommodations, because implementing such accommodations will satisfy the duty to accommodate under Title VII. Such a result is entirely consistent with the frequently recognized goal of pro-

moting voluntary compliance with the requirements of Title VII. *See, e.g., Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44 (1974); *W.R. Grace & Co. v. Local 759*, 461 U.S. 757, 770-771 (1983).

CONCLUSION

For the reasons stated, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

AUGUST W. STEINHILBER
GWENDOLYN H. GREGORY
THOMAS A. SHANNON
National School
Boards Association
1680 Duke Street
Alexandria, VA 22314
(703) 838-6712

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL *
WILLIAM S. FRANKLIN
McGUINNESS & WILLIAMS
1015 15th Street, N.W.
Suite 1200
Washington, D.C. 20005
(202) 789-8600
*Attorneys for Amicus Curiae
Equal Employment Advisory
Council*

* Counsel of Record

March 31, 1986

9
No. 85-495

Supreme Court, U.S.

FILED

JUN 17 1986

JOSEPH F. SPANIOL, JR.
CLERK

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1985

**Ansonia Board of Education, et al.,
Petitioners,**

v.

**Ronald Philbrook, et al.,
Respondents.**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**AMICUS CURIAE BRIEF OF THE
STATE OF CONNECTICUT IN SUPPORT
OF RESPONDENT PHILBROOK**

**JOSEPH I. LIEBERMAN
Attorney General of the
State of Connecticut**

**CLARINE NARDI RIDDLE
Deputy Attorney General**

**PHILIP A. MURPHY, JR.
Commission Counsel
Comm. on Human Rights
and Opportunities
(Of Counsel)**

**HENRY S. COHN*
ROBERT B. TEITELMAN
Assistant Attorneys
General
30 Trinity Street
Hartford, CT 06106
(203) 566-4990
*- Counsel of Record**

49p

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT.....	5
ARGUMENT.....	7
I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PLAINTIFF ESTABLISHED A <u>PRIMA FACIE</u> CASE...	7
A. A <u>PRIMA FACIE</u> CASE OF RELI- GIOUS DISCRIMINATION REQUIRES ONLY A SHOWING THAT THE PLAIN- TIF HAS A BONA FIDE RELIGIOUS BELIEF WHICH CONFLICTS WITH AN EMPLOYMENT REQUIREMENT, THAT THE PLAINTIFF INFORMED THE EM- PLOYER OF THIS BELIEF, AND THAT THE PLAINTIFF WAS DISCI- PLINED FOR FAILURE TO COMPLY WITH THE CONFLICTING EMPLOY- MENT REQUIREMENT.....	7
1. The Clear Language of Title VII Extends to Terms and Conditions of Employment as Well as Discharges.....	12

2.	Just as Cases of Race or Sex Discrimination Are Not Limited to Discharges, Cases of Religious Discrimination Should Not Be Limited to Discharges.....	15
B.	IN THIS CASE THE PLAINTIFF ESTABLISHED ALL OF THE ELEMENTS OF A <u>PRIMA FACIE</u> CASE.....	20
1.	The Plaintiff Had a Bona Fide Religious Belief Which Conflicted With an Employment Requirement.....	20
2.	The Plaintiff Informed His Employer of this Belief.....	23
3.	The Plaintiff Was Disciplined For Failing to Comply With the Employment Requirement.....	24
II.	THE SCHOOL BOARD IS OBLIGED TO ACCEPT THE REASONABLE SUGGESTIONS OF ITS EMPLOYEE PROVIDED THEY DO NOT CAUSE UNDUE HARDSHIP.....	26
	CONCLUSION.....	41

TABLE OF AUTHORITIES

CASES	Page
<u>American Postal Workers Union v. Postmaster General</u> , 781 F.2d 772 (9th Cir. 1986).....	35-37
<u>Anderson v. General Dynamics Convair</u> , 589 F.2d 397 (9th Cir. 1978), <u>cert. denied</u> , 442 U.S. 921 (1979).....	9,33,35-36
<u>Brener v. Diagnostic Center Hospital</u> , 671 F.2d 141 (5th Cir. 1982).....	9,31-32,39
<u>Brown v. General Motors Corp.</u> , 601 F.2d 956 (8th Cir. 1979).....	9
<u>Bundy v. Jackson</u> , 641 F.2d 934 (D.C. Cir. 1981).....	17
<u>Burns v. Southern Pac. Transp. Co.</u> , 589 F.2d 403 (9th Cir. 1978), <u>cert. denied</u> , 439 U.S. 1072 (1979).....	9,33-37
<u>Carroll v. Talman Federal S. & L. Ass'n of Chicago</u> , 604 F.2d 1028 (7th Cir. 1979).....	17-18
<u>E.E.O.C. v. Caribe Hilton</u> , 597 F.Supp. 1007 (D. P.R. 1984).....	9

<u>E.E.O.C. v. Shell Oil Co.,</u> U.S. —, 104 S.Ct. 1621 (1984).....	41
<u>Griqqs v. Duke Power Co.,</u> 401 U.S. 424 (1971).....	41
<u>Hishon v. King & Spalding,</u> U.S. —, 104 S.Ct. 2229 (1984).....	14,16
<u>Inhabitants of Montclair Tp. v.</u> <u>Ramsdell,</u> 107 U.S. 147, 152 (1883).....	13
<u>Oscar Mayer & Co. v. Evans,</u> 441 U.S. 750 (1979).....	41
<u>Philbrook v. Ansonia Bd. of Ed.,</u> 757 F.2d 476 (2d Cir. 1985), cert. granted, U.S. —, 106 S.Ct. 848 (1986).....	passim
<u>Pinsker v. Joint Dist. No. 28J of</u> <u>Adams and Arapahoe,</u> 735 F.2d 388 (10th Cir. 1984).....	10
<u>Rogers v. E.E.O.C.,</u> 454 F.2d 234 (5th Cir. 1971).....	15-16
<u>Stone v. Powell,</u> 428 U.S. 465 (1976).....	27
<u>Thomas v. Review Board,</u> 450 U.S. 707 (1981).....	26
<u>Thornton, Estate of v. Caldor,</u> <u>Inc.,</u> U.S. —, 105 S.Ct. 2914 (1985).....	4,5,27-29

<u>Trans World Airlines, Inc., v.</u> <u>Hardison</u> , 432 U.S. 63 (1977).....	29-30
<u>Turpen v. Missouri - Kansas -</u> <u>Texas Railroad Co.</u> , 736 F.2d 1022 (5th Cir. 1984).....	8, 32
<u>United States v. Menasche</u> , 348 U.S. 528 (1955).....	13
<u>Vinson v. Taylor</u> , 753 F.2d 141 (D.C. Cir. 1985), <u>reh'g</u> <u>denied</u> , 760 F.2d 1330 (1985) (per curiam), <u>cert. granted</u> , U.S. —, 106 S.Ct. 57 (1985).....	16-17
<u>Yott v. North American Rockwell</u> <u>Corp.</u> , 602 F.2d 904 (9th Cir. 1979).....	36

STATUTES

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, et seq.....	passim
42 U.S.C. § 2000e(j).....	28
42 U.S.C. § 2000e-2(a)..	12-13, 15, 16, 18
42 U.S.C. § 2000e-5(c) - 2000e-5(e).....	4
42 U.S.C. § 2000e-8(b).....	4

Conn. Gen. Stat. § 46a-51(18)..... 2-3

Conn. Gen. Stat. § 46a-60..... 2

REGULATIONS

29 C.F.R. § 1605.2(c)(2)..... 28,39-40

OTHER AUTHORITIES

Supreme Court Rule 36.4..... 2

**IN THE
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1985

No. 85-495

**Ansonia Board of Education, et al.,
Petitioners,**

v.

**Ronald Philbrook, et al.,
Respondents.**

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**AMICUS CURIAE BRIEF OF THE
STATE OF CONNECTICUT IN SUPPORT
OF RESPONDENT PHILBROOK**

INTEREST OF AMICUS CURIAE

This brief is submitted by the
State of Connecticut as amicus curiae in
support of the position of respondent
Ronald Philbrook. This brief is

submitted in accordance with Supreme Court Rule 36.4.

The State of Connecticut has prohibited discrimination, inter alia, on the basis of religious creed.^{1/} In addition, the State of Connecticut's definition of discrimination on the basis of religious creed^{2/} mirrors the definition

1/ (a) It shall be a discriminatory practice in violation of this section:

(1) For an employer ... to discharge from employment any individual or to discriminate against him in compensation or in terms, conditions or privileges of employment because of the individuals race, color, religious creed, age, sex, marital status, national origin, ancestry, present or past history of mental disorder, mental retardation or physical disability....

Conn. Gen. Stat. § 46a-60 (emphasis added).

2/ "Discrimination on the basis of religious creed" includes but is not

(footnote cont'd)

in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. (hereinafter "Title VII"). These state statutory provisions provide protection very similar to the protection provided in Title VII. The State of Connecticut agency charged with the duty of enforcing this state statute is the Commission on Human Rights and Opportunities (hereinafter "CHRO"). The

(footnote cont'd from previous page)

limited to discrimination related to all aspects of religious observances and practice as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without under hardship on the conduct of the employer's business.

Conn. Gen. Stat. § 46a-51(18) (emphasis added).

CHRO is also an agency that cooperates with the Equal Employment Opportunity Commission pursuant to the provisions of 42 U.S.C. §§ 2000e-5(c) - 2000e-5(e), 2000e-8(b). As such an agency, the CHRO also investigates alleged violations of Title VII occurring within the State of Connecticut.

In addition, during the Court's October 1984 term, the Attorney General of the State of Connecticut, intervened in a case, Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 105 S.Ct. 2914 (1985). The difference between an absolute requirement to accommodate religion and a requirement that an employer make a reasonable accommodation, such as the requirement of Title VII, was addressed in a concurring opinion in Thornton.

105 S.Ct. at 2918 (O'Connor, J., concurring). Legal issues that are present in this case flow directly from legal issues that were addressed by Justice O'Connor in her concurrence in Thornton. Thus the State of Connecticut has a substantial interest in the proper resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

A prima facie case of religious discrimination under Title VII is established by showing three factors. These are: (1) that the plaintiff has a bona fide religious belief that conflicts with an employment requirement; (2) that the plaintiff has informed the employer of this belief; and (3) that the

plaintiff was disciplined for failing to comply with this requirement. In this case, the Court of Appeals correctly concluded that the plaintiff established a prima facie case.

In this case, where the employer has suggested an accommodation which did not resolve the employee's claim of religious discrimination, the employee must be permitted to suggest further reasonable accommodations. These proposals must be accepted by the employer, provided the accommodations do not cause undue hardship to the employer. Such a rule allows the workplace to be open to all religious faiths and allows the employee to participate in the conciliation process envisioned by Title VII, without burdening an employer.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE PLAINTIFF ESTABLISHED A PRIMA FACIE CASE

A.

A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION REQUIRES ONLY A SHOWING THAT THE PLAINTIFF HAS A BONA FIDE RELIGIOUS BELIEF WHICH CONFLICTS WITH AN EMPLOYMENT REQUIREMENT, THAT THE PLAINTIFF INFORMED THE EMPLOYER OF THIS BELIEF, AND THAT THE PLAINTIFF WAS DISCIPLINED FOR FAILURE TO COMPLY WITH THE CONFLICTING EMPLOYMENT REQUIREMENT

The initial question in this case is the question of what constitutes a prima facie case of religious discrimination under Title VII. For the reasons discussed infra, this Court should conclude that a prima facie case is

established where there is a bona fide religious belief conflicting with an employment requirement, the employee has informed the employer of this belief, and the employee was disciplined for failing to comply with the employment requirement.^{3/} This is the standard

3/ Courts of Appeal are in agreement that two elements of the prima facie case are the showing of a bona fide religious belief conflicting with an employment requirement and the showing that the plaintiff informed the employer of this belief. However, they take different approaches with respect to the third element of the prima facie case. Some Courts of Appeal have stated that an employee must show that he was disciplined for failing to comply with the employment requirement. Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476, 481 (2d Cir. 1985), cert. granted, ___ U.S. ___, 106 S.Ct. 848 (1986); Turpen v. Missouri - Kansas - Texas Railroad Co., 736 F.2d 1022, 1026 (5th Cir. 1984). Other Courts of

(footnote cont'd)

that was applied by the United States Court of Appeals for the Second Circuit in this case. Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476, 481 (2d Cir. 1985).^{4/}

(footnote cont'd from previous page)

appeal have stated that an employee must show that he was discharged for failing to comply with the employment requirement. Brener v. Diagnostic Center Hospital, 671 F.2d 141, 144, (5th Cir. 1982); Brown v. General Motors Corp., 601 F.2d 956, 959 (8th Cir. 1979); Anderson v. General Dynamics Convair, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979); see also, E.E.O.C. v. Caribe Hilton, 597 F.Supp. 1007, 1010 (D. P.R. 1984). One court has indicated that an employee need only be threatened with discharge. Burns v. Southern Pac. Transp. Co., 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979).

4/ We also note that one Court of Appeals, in addressing the merits of a case that did not involve a dis-

(footnote cont'd)

There are a variety of approaches taken by different courts. Whatever approaches have been used have not, until this case, considered whether something less than a discharge, or threat of a discharge, is sufficient to make out a prima facie case of religious discrimination. In each of the cases referred

(footnote cont'd from previous page)

charge, concluded that the plaintiff failed to establish the element of a prima facie case requiring a showing that a religious belief conflicted with an employment requirement. The Court of Appeals for the Tenth Circuit noted that "[d]efendant's policy and practices jeopardized neither Pinsker's job nor his observation of religious holidays." Pinsker v. Joint Dist. No. 28J of Adams and Arapahoe, 735 F.2d 388, 391 (10th Cir. 1984). This is entirely different from the instant case where Ronald Philbrook's religious obligations clearly conflicted with the policy of his employer.

to in n.3, at pp. 8 - 9, supra, other than the instant case, the case developed out of a discharge, or threat of a discharge. In these cases, the courts did not have to look any further than the discharge to reach the conclusion that a prima facie case was established. On the other hand, in the case at bar, the plaintiff was not discharged nor was he threatened with discharge. Thus, it was necessary for the Second Circuit to examine whether something less than a discharge would suffice to establish a prima facie case.

As argued infra, this Court should conclude that the adverse impact of the Ansonia Board of Education's policy on the compensation, terms, conditions and privileges of Ronald Philbrook's

employment is enough to establish this element of the prima facie case. This conclusion is supported by the clear language of Title VII and by the approach taken under Title VII with respect to racial discrimination and sex discrimination.

1. The Clear Language of Title VII Extends to Terms and Conditions of Employment as Well as Discharges

The proper starting point for examining the intent of Title VII is the text of Title VII itself. Indeed, Title VII clearly provides:

It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, condi-

tions or privileges of employment because of such individual's race, color, religion, sex or national origin....

42 U.S.C. § 2000e-2(a) (emphasis added).

Clearly, Congress contemplated that Title VII was intended to cover more than just a discharge. This Court has recognized that it is its duty "to give effect, if possible, to every clause and word of a statute." United States v. Menasche, 348 U.S. 528, 538-539 (1955) (quoting Inhabitants of Montclair Tp. v. Ramsdell, 107 U.S. 147, 152 (1883)). Were the Court to interpret Title VII as applying only to discharges, the language regarding discrimination with respect to compensation, terms, conditions or privileges of employment would be without meaning.

This Court has noted that there is significance to the language in Title VII regarding compensation, terms, conditions or privileges of employment. Benefits comprising the incidents of employment or forming "an aspect of the relationship between the employer and employees," [citation omitted], may not be afforded in a manner contrary to Title VII." Hishon v. King & Spalding, ___ U.S. ___, 104 S.Ct. 2229, 2234 (1984).

By including language in Title VII regarding terms, conditions, and privileges of employment, Congress expressed a very clear desire to reach employment discrimination other than discharges. This approach to employment discrimination has been recognized by courts in

the areas of race discrimination and sex discrimination.

2. Just as Cases of Race or Sex Discrimination Are Not Limited to Discharges, Cases of Religious Discrimination Should Not Be Limited to Discharges

Courts that have addressed questions of the breadth of Title VII have also concluded that it reaches beyond discharges alone. The language of Title VII at 42 U.S.C. § 2000e-2(a)(1):

[E]vinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of such nefarious activities. Rather, it chose the path of wisdom by being unrestrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of

tomorrow.... [T]oday employment discrimination is a far more complex and pervasive phenomenon, as the nuances and subtleties of discriminatory employment practices are no longer confined to bread and butter issues.

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971).

Discrimination that may be redressed by using Title VII, as the Hishon decision directs, is not limited to discharges. Hishon v. King & Spalding, ___ U.S. at ___, 104 S.Ct. at 2234. A discharge is not needed in order to state a prima facie case under Title VII. An infringement of Title VII is not "necessarily dependent upon the victim's loss of employment or promotion." Vinson v. Taylor, 753 F.2d 141, 144 (D.C. Cir. 1985), reh'g denied, 760 F.2d 1330 (1985), cert. granted, ___

U.S. ___, 106 S.Ct. 57 (1985). A discriminatory work environment is enough, "regardless of whether the complaining employees lost any tangible job benefits as a result of the discrimination." Bundy v. Jackson, 641 F.2d 934, 943-944 (D.C. Cir. 1981). Indeed, "sexually stereotyped insults and demeaning propositions" create a work atmosphere that may violate Title VII. Bundy, 641 F.2d at 944; Vinson, 753 F.2d at 145-146.

Likewise, a dress code that requires women to wear prescribed uniforms but does not impose a requirement that men wear uniforms, violates Title VII. Carroll v. Talman Federal S. & L. Ass'n of Chicago, 604 F.2d 1028, 1030 (7th

Cir. 1979). This too is discrimination less onerous than a discharge that is covered by Title VII.

These courts properly recognize that Congress did not intend Title VII to be limited only to discharges. In the areas of race discrimination and sex discrimination Title VII encompasses all discrimination affecting terms, conditions, and privileges of employment. No principled distinction exists for employing a different standard when evaluating religious discrimination.

In 42 U.S.C. § 2000e-2(a), Congress included religion along with race and sex as prohibited bases of discrimination in the workplace. Thus, religious discrimination affecting terms, conditions, and privileges of employment

should be treated in the same fashion as race discrimination and sex discrimination. Congress intended Title VII to include terms, conditions, and privileges of employment, as well as discharges. Since the plaintiff established that the terms and conditions of his employment interfered with bona fide religious beliefs of which he had informed his employer, the Court should conclude that he properly established a prima facie case of religious discrimination.

B.

IN THIS CASE THE PLAINTIFF ESTABLISHED ALL OF THE ELEMENTS OF A PRIMA FACIE CASE

1. The Plaintiff Had a Bona Fide Religious Belief Which Conflicted With an Employment Requirement

In this case, the plaintiff did have a bona fide^{5/} religious belief that conflicted with an employment requirement. The plaintiff had a religious belief that required him to refrain from secular employment on holy days. Several of these holy days would fall during

5/ The Court of Appeals noted that a finding of insincerity of the plaintiff's religious belief would be clearly erroneous based on the record of the proceedings before the District Court. Indeed, even though the District Court decided against the plaintiff, it expressly declined to find insincerity of the plaintiff's religious beliefs. Philbrook, 757 F.2d at 481.

the school year. In order for the plaintiff to give effect to his religious beliefs by observing his religious holidays, he would have to miss approximately six school days per year. Philbrook v. Ansonia Bd. of Ed., 757 F.2d 476, 478 (2d Cir. 1985), cert. granted, ___ U.S. ___, 106 S.Ct. 848 (1986). The plaintiff's salary would be docked for missing some of these school days. Philbrook, 757 F.2d at 479.^{6/}

6/ This demonstrates the conflict between the plaintiff's religious belief and an employment practice. In order to give effect to his religious belief, the plaintiff is put in a position where he faces a reduction in income. However, we note that while this is sufficient for establishing one element of the prima facie case, the prima facie case alone is not sufficient to establish a breach of Title VII in a case, like this, where the issues

(footnote cont'd)

The plaintiff demonstrated a religious belief conflicting with an employment requirement. By showing this religious belief, refraining from secular employment on holy days falling during the school year, the plaintiff satisfied this element of the prima facie case.

(footnote cont'd from previous page)

are contested. Rather, once the prima facie case has been established, the judicial inquiry moves forward in order to focus upon the reasonableness of proposed accommodations, and any undue hardship to the employer. This further judicial inquiry is fully discussed in part II of this brief, at pp. 26 - 41, infra.

2. The Plaintiff Informed His
Employer of this Belief

The Court of Appeals noted that the plaintiff's unrebutted testimony demonstrated that he had informed both his employer and union of the conflict between his religious belief and employment requirements. Philbrook, 757 F.2d at 482.^{7/} Thus, this element of the prima facie case was also established. Philbrook, 757 F.2d at 482.

7/ The Court of Appeals remanded this case, not for another finding as to whether or not the plaintiff provided notice of this belief. Rather, the purpose of the remand, as to this issue, was only to clarify, if necessary, the point in time when the notice was provided for the purpose of ascertaining what damages were proper. Philbrook, 757 F.2d at 482.

3. The Plaintiff Was Disciplined
For Failing to Comply With the
Employment Requirement

Finally, it is clear that the plaintiff was disciplined for failing to comply with the employment requirement. The plaintiff's terms and conditions of employment were affected in that, even under the proposal of the employer, the plaintiff's salary would be docked substantially.^{8/} Such action by the employer having an adverse effect on the terms and conditions of the plaintiff's employment is sufficient to establish this element of the prima facie case under Title VII.

8/ In 1984, the plaintiff's salary would be docked \$130 for each day that he was absent without authorization. This is the case even though a substitute teacher would only have cost the employer \$30 per day. Philbrook, 757 F.2d at 480 n.3.

For all of the reasons articulated above, the plaintiff established a prima facie case of religious discrimination under Title VII. Of course, the prima facie case alone does not entitle the plaintiff to prevail where the defendants contested the claim. Rather, upon finding a prima facie violation, the burden shifts to the employer to demonstrate that it would be an undue hardship for the employer to reasonably accommodate the employee's religious obligations. As argued at pp. 26 - 41, infra, the petitioner board of education is obliged to accept reasonable suggestions of respondent Philbrook, provided they do not cause undue hardship.

II.

THE SCHOOL BOARD IS OBLIGED TO
ACCEPT THE REASONABLE SUGGES-
TIONS OF ITS EMPLOYEE, PROVID-
ED THEY DO NOT CAUSE UNDUE
HARDSHIP

The second issue raised by the
School Board is whether Title VII^{9/} re-
quires the School Board to adopt the
reasonable accommodation suggestions of
its employee-teacher, should these prove
on remand to cause no undue hardship to
the Board.^{10/} Your amicus contends that

9/ Respondent may well be entitled to relief under the Free Exercise clause. See Thomas v. Review Board, 450 U.S. 707, 717 (1981) ("Here as in Sherbert, the employee was put to a choice between fidelity to religious belief or cessation of work..."). The Second Circuit left this issue for the District Court on remand. Philbrook, 757 F.2d at 487, 488 n.12.

10/ This Court should not reach the issue of whether undue hardship, as

(footnote cont'd)

the Board must defer to the employee's non-burdensome suggestions.

As Justice O'Connor pointed out last term:

I do not read the Court's opinion [in this case] as suggesting that the religious accommodation provisions of Title VII of the Civil Rights Act are similarly invalid. These provisions preclude employment discrimination based on a person's religion and require private employers to reasonably accommodate the religious practices of employees

(footnote cont'd from previous page)

raised on pages 25-31 of Petitioners' brief, exists. This is a factual matter for the District Court. Further, the issue improperly raises matters not within the scope of the questions presented in the Petition for Certiorari. Stone v. Powell, 428 U.S. 465, 480 n.15 (1976). The only issue raised in the petition is whether the employer must accept the suggestions of the employee that do not pose any undue hardship. Petition for Certiorari, p. i.

unless to do so would cause undue hardship to the employer's business.

Estate of Thornton v. Caldor, Inc., ____
U.S. ___, 105 S.Ct. 2914, 2919 (1985)
(emphasis added).^{11/} Such deference to
the employee "has the valid secular

^{11/} Justice O'Connor's interpretation of Title VII parallel's the express words of the section in question:

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 U.S.C. § 2000e(j)(emphasis added); see also, discussion of EEOC guidelines, at pp. 40 - 41, infra.

purpose of assuring employment opportunity to all groups in our pluralistic society." Estate of Thornton v. Caldor, Inc., ___ U.S. ___, 105 S.Ct. at 2919.

At the outset we emphasize that Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), does not resolve the present controversy. There, the employee's suggestions were specifically found to be unduly burdensome by the District Court. 432 U.S. at 83 n.14. In Hardison, acceding to the employee's suggestions would have violated the seniority provisions of the collective bargaining agreement. Therefore, the Court concluded that the employer had made a reasonable effort to accommodate the employee's religious belief.

This case is unlike Hardison. The employer here relies on an accommodation drawn from the collective bargaining agreement. The employee suggests two alternatives that more adequately accommodate his religious needs. Factually the employer suggests that a policy of three days of paid leave and three days of unpaid leave satisfies its duty. Philbrook has counteroffered with two alternatives: 1) to allow him to use personal business leave for religious holy days, or 2) to allow him to receive his salary, less the cost of a substitute teacher, with whom he would spend extra work time.

The Second Circuit, having found a prima facie case, has appropriately remanded the matter to the District Court

to determine if Philbrook's suggestions pose an undue hardship. Philbrook, 757 F.2d at 485. This Court should conclude that the Second Circuit was correct in declaring that the employer must accept the further suggestions of its employee which resolve the dispute between them where the reasonable suggestions do not cause "undue hardship."

Both the Fifth and the Ninth Circuits have analyzed the concurrent duties of the employer and employee to obviate religious discrimination. In Brener v. Diagnostic Center Hospital, 671 F.2d 141 (5th Cir. 1981), the employer offered a Sabbatarian employee flexible hours and the possibility of swapping amongst staff to satisfy the employee's Saturday work schedule

problem. Even though the Court of Appeals rejected the employee's objection to the employer's accommodations, 671 F.2d at 145, in fact the Court of Appeals considered whether the "further measures [suggested by the employee] to accommodate him outside the pharmacy's scheduling system would result in 'undue hardship' to the hospital and its employees." 671 F.2d at 146. The Court of Appeals affirmed the District Court's conclusion that the employee's additional suggestions were an undue hardship. 671 F.2d at 146; see also Turpen v. Missouri-Kansas-Texas R. Co., 736 F.2d 1022, 1026 (5th Cir. 1984) (factual decisions of "reasonable accommodation" and "undue hardship" are interlocking).

The Ninth Circuit has more extensively considered this issue. In Anderson v. General Dynamics, 589 F.2d 397 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979), the employee, discharged for refusal to pay union dues, established a prima facie case of religious discrimination. The Court of Appeals declared:

The burden was thereafter upon General Dynamics and the Union to prove that they made good faith efforts to accommodate Anderson's religious beliefs and, if those efforts were unsuccessful, to demonstrate that they were unable reasonably to accommodate his beliefs without undue hardship.

Anderson, 589 F.2d at 401.

The companion case, Burns v. Southern Pac. Transp. Co., 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979), states the rule even more expressly:

Once the employer has made more than a negligible effort to accommodate the employee (Trans World Airlines v. Hardison, supra, 432 U.S. at 77, 97 S.Ct. 2264) and that effort is viewed by the worker as inadequate, the question becomes whether the further accommodation requested would constitute "undue hardship." Once again, this term is not defined by the Civil Rights Act, but the burden of proving undue hardship rests upon the employer or union. The Hardison Court found that the employer had demonstrated undue hardship where the accommodation requested by the employee (a four-day work week) would have effectively required preferential treatment on the basis of religion for Sabbatarians, causing sacrifices or dislocation in the work schedules of fellow-workers or requiring the employer to hire outsiders to work Saturday shifts at "premium wages." (Id. at 81-84, 97 S.Ct. 2264) The Court held that where the impacts upon co-workers or costs are greater than de minimis, undue hardship is demonstrated. (Id. at 84, 97 S.Ct. 2264)

Burns, 589 F.2d at 406 (emphasis added). The Burns Court held that the employer and the union had failed to demonstrate undue hardship in accommodating the employee's request to pay an amount equivalent to his union dues to charity.

The recent case of American Postal Workers Union v. Postmaster General, 781 F.2d 772 (9th Cir. 1986)^{12/} complements the Anderson - Burns rule. There, the Postal Service's proposal "effectively eliminated the religious conflict visited upon the affected employees." 781

12/ In American Postal Workers window clerks objected to accepting draft registration materials. The Post Office management offered to transfer the clerks to non-window positions. The clerks objected to the transfers because of the secular reason that the window positions have a better employment status.

F.2d at 776. The employees' objections to the employer's attempted accommodation were based upon entirely "secular grounds." 781 F.2d at 776.^{13/} The employer was then allowed to prove that its accommodation preserved "the affected employee's employment status" in lieu of proving that the employee's suggestions constituted undue hardship. 781 F.2d at 776 - 777; see also Yott v. North American Rockwell Corp., 602 F.2d

13/ Had the employees' objections not been based on secular grounds, but religious grounds, Burns would apply. "If the accommodation proposed by the employer fails to eliminate the employee's religious conflict, the employer must implement an alternative accommodation proposed by the employee, unless implementation of that accommodation would cause 'undue hardship' to the employer." American Postal Workers, 781 F.2d at 776 (emphasis added).

904, 907-908 (9th Cir. 1979) ("good faith effort to accommodate" made by employer).

Clearly, this case parallels Burns. As in Burns, the Ansonia School Board "made no effort to accommodate [the employee's] particular religious beliefs. In effect, they informed [the employee] that his only alternative was to accept the terms of the existing contract...." Burns, 589 F.2d at 406. The suggestion of the School Board that Philbrook take three unpaid leave days hardly "eliminated the religious conflict." American Postal Workers, 781 F.2d at 776. As the Second Circuit found, "[t]he school board's leave policy forced [Philbrook] to act in a way inconsistent with his religious belief." Philbrook, 757 F.2d

at 482. Since the employee viewed the employer's suggested accommodation as inadequate, the Second Circuit appropriately remanded the case to the District Court to analyze the further suggestions of the employee.

Affirming the decision of the Second Circuit makes good sense. Except in those circumstances where the employer can prove that he has completely eliminated the religious dispute, the employee should be permitted to offer other accommodations which cause no undue hardship.^{14/}

^{14/} Of course, the employer who acts in good faith to resolve the matter should not be held hostage to an employee who objects to an employer's suggestion solely for secular reasons, even though an employer's proposal completely resolves the religious controversy and does not in any other way disadvantage the employee's job status.

As the Fifth Circuit's opinion in Brener, in commenting on the duty of the employee to cooperate with an employer's efforts to accommodate, states:

[T]he statute's use of the term 'reasonable' suggests: bilateral cooperation is appropriate in the search for an acceptable reconciliation of the needs of the employee's religion and exigencies of the employer's business.

Brener, 671 F.2d at 145-146.

By authorizing employee input in the nature of the accommodation to be made without imposing an undue burden on the employer, the Second Circuit's decision commands just that "bilateral cooperation".

Finally, it is important to note that the Equal Employment Opportunity Commission has approved a regulation paralleling the holding of the Second Circuit:

When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining:

(i) The alternatives for accommodation considered by the employer or labor organization; and

(ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

29 C.F.R. § 1605.2(c)(2) (emphasis added).

This administrative interpretation is entitled to "great deference". Griggs v. Duke Power Co., 401 U.S. 424, 433-434 (1971); Oscar Mayer & Co. v. Evans, 441 U.S. 750, 761 (1979); E.E.O.C. v. Shell Oil Co., 104 S.Ct. 1621, 1636 n.36 (1984). The EEOC regulation supports the Second Circuit's requirement that under Title VII the employee's suggestions, which do not pose for the employer an undue hardship, are required to be accepted by the employer.

CONCLUSION

For all of the reasons set forth in this brief, the Court should conclude that the United States Court of Appeals for the Second Circuit correctly decided

this case. Accordingly, the State of Connecticut, as amicus curiae, requests that the decision of the United States Court of Appeals for the Second Circuit be affirmed.

RESPECTFULLY SUBMITTED,

JOSEPH I. LIEBERMAN
Attorney General of the
State of Connecticut

CLARINE NARDI RIDDLE
Deputy Attorney General

HENRY S. COHN*
ROBERT B. TEITELMAN
Assistant Attorneys General
30 Trinity Street
Hartford, CT 06106
(203) 566-4990

PHILIP A. MURPHY, JR.
Commission Counsel
Comm. on Human Rights
and Opportunities
(Of Counsel)

*- Counsel of Record

June, 1986

MOTION FILED
JUN 27 1986

No. 85-495

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK
Respondent.

On Appeal From The United States
Court of Appeals For The Second Circuit

**MOTION FOR LEAVE TO FILE AMICUS CURIAE
BRIEF AND BRIEF OF COUNCIL ON RELIGIOUS
FREEDOM AS AMICUS CURIAE IN SUPPORT OF
RESPONDENT**

Of Counsel:

JAMES M. PARKER
1120 W. Loyola Street
Chicago, IL 60626
ROBERT W. NIXON
6840 Eastern Avenue, NW
Washington, DC 20012
HAROLD J. LANCE
204 N. San Antonio Avenue
Ontario, CA 91762
ROLLAND TRUMAN
4522 Greenmeadow Road
Long Beach, CA 90808

LEE BOOTHBY
Counsel of Record
Attorney for Council on
Religious Freedom,
Amicus Curiae
Business Address:
208 W. Mars Street
Berrien Springs, MI 49103
(616) 471-7787

No. 85-495

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK

Respondent.

On Appeal From The United States
Court of Appeals For The Second Circuit

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE**

Council on Religious Freedom respectfully moves the Court for leave to file the accompanying brief in this case as *Amicus Curiae*. The consent of the attorney for the respondent, Ronald Philbrook, has been obtained; but counsel for the petitioners has not consented to the filing of a brief by Council on Religious Freedom.

The applicant, Council on Religious Freedom, has an interest in this case in that it is an organization composed of individuals who are active in church affairs, some in official church responsibilities, and some as lay leaders. Many of the members of the board are directly involved in the day-to-day activity of attempting to work out accommodation in the work place for individuals whose religious beliefs conflict with work rules and requirements. These individuals have substantial knowledge and experience

concerning the problems that arise in working out accommodations under Title VII of the Civil Rights Act of 1964. Legal counsel for the organization have been involved in hundreds of Title VII accommodation cases and have direct knowledge of the problems that develop in attempting to work out accommodation for religious needs under the requirements of Title VII.

The purpose of the Council on Religious Freedom as set forth in its Articles of Incorporation include "taking action to eliminate religious discrimination in public and private employment and other areas of concern which interfere with the full experience of religious freedom."

This *Amicus Curiae* brief takes the position that an employer must adopt the accommodation of an employee's religious beliefs that least disadvantages the employee with regard to the terms and conditions of employment so long as it does not cause undue hardship to the employer. This *Amicus* contends that Title VII does not merely require the elimination of a conflict between a work requirement and a religious practice or belief, but also makes it an unlawful employment practice for an employer to discriminate "with respect to compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-(a)(1). For this reason, the requirement that the accommodation least disadvantageous to the employee be adopted follows directly from the language of the Act.

Respectfully submitted,

LEE BOOTHBY

Counsel of Record

Attorney for Council on

Religious Freedom,

Amicus Curiae

Business Address:

208 W. Mars Street

Berrien Springs, MI 49103

(516) 471-7787

QUESTIONS PRESENTED

1. Did the court below err in holding that the employee established a prima facie case of religious discrimination under Title VII of the Civil Rights Act of 1964 by refusing to provide an employee with additional paid leave for religious observance?

2. Does Title VII require the employer to accept the employee's proposal where the employer and the employee have each proposed reasonable accommodations of the employee's religious beliefs and the employer's proposal results in an economic disadvantage to the employee?

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF <i>AMICUS CURIAE</i> .	i
QUESTIONS PRESENTED.	iii
TABLE OF AUTHORITIES.	v
INTEREST OF THE <i>AMICUS CURIAE</i> .	1
SUMMARY OF ARGUMENT.	2
ARGUMENT .	3
I. The Respondent Proved A Prima Facie Case Of Religious Discrimination .	3
II. Title VII Requires An Employer To Accept An Accommodation Which Least Disadvantages An Employee So Long As It Does Not Cause Undue Hardship .	6
CONCLUSION.	17

TABLE OF AUTHORITIES

	Page
CASES:	
<i>Alexander v. Gardner-Denver</i> , 415 U.S. 36 (1974). . . .	10, 15
<i>Anderson v. General Dynamics Convair Aerospace Division</i> , 589 F.2d 397 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979). . . .	9, 10
<i>Bartmess v. Drewyers USA, Inc.</i> , 444 F.2d 1186 (7th Cir. 1981), cert. denied, 404 U.S. 1939 (1971). . . .	15
<i>Boys Markets, Inc. v. Retail Clerk's Local 770</i> , 398 U.S. 235 (1970). . . .	16
<i>Burns v. Southern Pacific Transportation Co.</i> , 589 F.2d 403 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979). . . .	10
<i>Cummins v. Parker Seal Co.</i> , 516 F.2d 544, 551 (6th Cir. 1975). . . .	12-13
<i>Draper v. United States Pipe and Foundry Co.</i> , 527 F.2d 515 (6th Cir. 1975)	12
<i>E. v. Capwell Co. v. Western Addition Community Org.</i> , 420 U.S. 50 (1975)	14
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1977). . . .	11
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971). . . .	5, 9
<i>Hishon v. King & Spalding</i> , 104 S.Ct. 2229 (1984). . . .	4, 5
<i>International Union of Electrical Radio and Machine Workers v. NLRB</i> , 684 F.2d 18 (D.C. Cir. 1980). . . .	14, 15
<i>Jubilee Manufacturing Co.</i> , 202 NLRB 272, 82 LRRM 1482 (1973), aff'd, 87 LRRM 3168 (1974)	15
<i>McDaniel v. Essex International Inc.</i> , 571 F.2d 338 (6th Cir. 1978)	10
<i>Nottelson v. Smith Steel Workers</i> , 643 F.2d 445 (7th Cir. 1981), cert. denied, 454 U.S. 1046 (1981). . . .	14
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2nd Cir. 1985). . . .	3, 10, 12, 14
<i>Pinsker v. Joint District No. 28 J</i> , 735 F.2d 388 (10th Cir. 1984). . . .	10
<i>Railway Employees' Dept. v. Hanson</i> , 351 U.S. 225 (1956)	16
<i>Redmond v. GAF Corp.</i> , 754 F.2d 897 (7th Cir. 1978). . . .	9, 13
<i>Robinson v. Lorillard</i> , 444 F.2d 791 (5th Cir. 1971). . . .	13, 14
<i>Steele v. L & N.R. Co.</i> , 323 U.S. 192 (1944)	16
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). . . .	2, 3, 5, 11, 12, 13
<i>Watkins v. Scott Paper Co.</i> 530 F.2d 1159 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976). . . .	4

Table of Authorities Continued

	Page
CONSTITUTIONAL AUTHORITIES:	
United States Constitution	
Amendment One.....	8
Amendment Fourteen.....	8
STATUTORY AUTHORITIES:	
Civil Rights Act of 1964, Title VII 42 U.S.C.	
§ 2000e-2(a)(1).....	<i>passim</i>
29 C.F.R. § 1605.2(c)(2), as amended, 45 Fed. Reg. 72610	
(1980).....	7
MISCELLANEOUS AUTHORITIES:	
118 Cong. Rec. 705-706 (1972).....	16
United States Commission on Civil Rights, Religion in the	
Constitution: A Delicate Balance, ch. 3 (1983).....	8

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

—
 No. 85-495

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

—
 On Appeal From The United States
 Court Of Appeals For The Second Circuit

—
**BRIEF OF COUNCIL ON RELIGIOUS FREEDOM
 AS AMICUS CURIAE
 IN SUPPORT OF RESPONDENT**
 —

INTEREST OF THE AMICUS CURIAE

The Council on Religious Freedom is a nonprofit corporation formed to uphold and promote the principles of religious liberty. The objectives and purposes of the organization include taking action to eliminate religious discrimination in public and private employment and other areas of concern which interfere with the full experience of religious freedom.

The Board of Directors of the Council on Religious Freedom is composed of individuals who are active in religious affairs, some in official capacity, and some on a lay basis, but all recognize the importance of preserving and promoting the concept of the constitutional principle of the "free exercise of religion" and opposing any encroachment by private or governmental agencies which limit or tend to inhibit the free exercise of religion.

SUMMARY OF ARGUMENT

The respondent met his burden of proving a prima facie case of religious discrimination under Title VII. It is not necessary that the respondent show that he was faced with the choice of observing his religion or keeping his job. Title VII protects against more than just discharge. It prohibits discrimination with respect to compensation, terms, conditions, or privileges of employment. The action of the school board in docking the respondent's pay was a sufficient detriment to the respondent to make out a prima facie case of discrimination.

An employer must adopt the accommodation of an employee's religious beliefs that least disadvantages the employee with regard to the terms and conditions of his employment so long as it does not cause undue hardship to the employer. Because of the unique nature of the problem of accommodating religious practices and observances, an employer can never rely solely on the reasonable and neutral character of its policies to fulfill its duty to accommodate.

This Court's opinion in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), does not hold that an employer can never be required to adopt an accommodation that contravenes a provision of a collective bargaining agreement. The undue hardship found in *Hardison*

resulted from the violation of contractual seniority rights of employees occasioned by the proposed accommodation.

ARGUMENT

I. The Respondent Proved A Prima Facie Case Of Religious Discrimination.

In order to make out a prima facie case of religious discrimination, a plaintiff must prove:

- (1) He or she has a bona fide religious belief that conflicts with an employment requirement; (2) He or she informed the employer of this belief; (3) He or she was disciplined for failure to comply with the conflicting employment requirement.

Philbrook v. Ansonia Board of Education, 757 F.2d 476, 481 (2nd Cir. 1985) (quoting, *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984).

In this case there is dispute whether the respondent sustained his burden under the first and third prongs of this test.

As to the first prong, the dispute revolved not around the existence of a conflict between the asserted belief and the respondent's work schedule, but around the sincerity of the respondent's belief. The district court refused to find that the respondent was insincere in his belief, and the court of appeals stated that any such finding would have been clearly erroneous. It is difficult to understand how the argument that a person who for several years observed the commands of his religion and had incurred considerable financial loss is insincere to his beliefs. A finding of insincerity in such a case would require substantial evidence of insincerity. The only argument advanced against the respondent's sincerity appears to be that he was less than totally scrupulous in following the precepts

of his faith. This is not enough. Title VII is not limited in its protection to the most pious among us.

There is also a dispute in this case as to whether respondent has shown a sufficient adverse action on the part of his employer to make a prima facie case under Title VII. The district court and the dissent in the Second Circuit make much of the fact that respondent was not faced with discharge for observing the holy days of his faith. But Title VII prohibits much more than the discharge of an employee because of his religion. It also makes it an unlawful employment practice for an employer to discriminate "with respect to compensation, terms, conditions, or privileges of employment." 42 U.S.C. § 2000e-2(a)(1).¹

"The benefit a plaintiff is denied need not be employment to fall within Title VII's protection; it need only be a term, condition, or privilege of employment." *Hishon v. King & Spalding*, 104 S.Ct. 2229, 2235 (1984) (emphasis in original). In this case the respondent has shown that he suffers in the amount of compensation he receives because of his religious practices. This is a violation of Title VII. *Watkins v. Scott Paper Co.*, 530 F.2d 1159 (5th Cir. 1976), cert. denied, 429 U.S. 861 (1976). The respondent also has shown that he has been denied the use of personal business leave days because his "legitimate and necessary" business is religious in nature. This is discrimination in the privileges of employment. "A benefit that is part and

¹ 42 U.S.C. § 2000e-2(a)(1) provides in pertinent part: "(a) It shall be an unlawful employment practice for an employer - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ."

parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all." *Hishon*, 104 S.Ct., at 2234.

It is important to understand what is "discrimination" in Title VII. This court in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), rejected the concept of "ill will" as the proper legal definition of "discrimination" in Title VII. The Court held that the anti-discrimination requirements of Title VII are also directed against the "consequences" or "effects" of an employment system. The absence of discriminatory intent does not prevent the making of a prima facie case under Title VII.

This Court said in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 71 (1977), "The emphasis of both the language and legislative history of [Title VII] is on eliminating discrimination in employment; similarly situated employees are not to be treated differently solely because they differ with respect to . . . religion." Respondent has shown that he is treated differently than other employees similarly situated because of his religious beliefs. An employee who needed to take off work for personal, secular business would get those days off with pay. But because the respondent needed those three days off for religious reasons, he would have to take them without pay. Therefore, the respondent and another employee could take the exact same number of days off, and the respondent would receive less compensation because his absences were necessitated by his religious beliefs. This differential treatment, even if ultimately justifiable under the statute, is enough to make out a prima facie case. Contrary to the view expressed in Judge Pollack's dissent, the school board's refusal to allow the use of personal business days for religious observance is an "artificial,

arbitrary, and unnecessary" barrier to full equality in employment opportunity for the respondent.

II. Title VII Requires An Employer To Accept An Accommodation Which Least Disadvantages An Employee So Long As It Does Not Cause Undue Hardship.

Title VII requires an employer to reasonably accommodate an employee's religious observance or practice unless such accommodation would cause undue hardship. The Second Circuit interpreted Title VII as requiring an employer to accept the accommodation preferred by the employee when various accommodations are proposed. Implicit in this requirement is the understanding that the employee's preference is dictated by the degree to which various proposals disadvantage him. It cannot, however, be argued that an employee may arbitrarily compel adoption of an accommodation more inconvenient to the employer when a less inconvenient accommodation is available that imposes no greater a disadvantage on the employee.

The requirement that the accommodation least disadvantageous to the employee be adopted follows directly from the language of the Act.² Title VII does not protect

² The "Guidelines on Discrimination Because of Religion" issued by the Equal Employment Opportunity Commission in 1980 states:

When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation is reasonable by examining:

- (i) The alternatives for accommodation considered by the employer or labor organization; and
- (ii) The alternatives, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. There-

only against discharge and the failure to hire. It makes an unlawful employment practice a policy that has a discriminatory effect with respect to compensation, terms, conditions, or privileges of employment. If Title VII only protected against discharge, it could be argued that any accommodation that allowed the employee to keep his job satisfied the employer's obligation. But a proposal that alleviates some of the burdens on the employee while still disadvantaging him with respect to compensation, terms, conditions, or privileges of employment is not a reasonable accommodation if the employer can, without undue hardship, further alleviate the burden. On the contrary, it continues to be an unlawful employment practice under Title VII. The intent of the statute is to place the employee, as much as possible, on an equal footing with all other employees.

The court of appeals was correct to rule that the school board's leave policy, standing alone, did not satisfy its obligation to reasonably accommodate the respondent's religious beliefs under Title VII. The court proceeded to unnecessarily confuse the issue by stating that it presumed that the board's leave policy was "reasonable."

The problem with the court's language is that it implies that the employer may be able to satisfy its obligation to accommodate merely by pointing to an existing generally applicable policy that is "reasonable" in the absence of a competing accommodation put forth by the employee. Such an interpretation would shift the burden to attempt

fore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

29 C.F.R. § 1605.2(c)(2), as amended, 45 Fed. Reg. 72610 (1980)

an accommodation from the employer to the employee. It also fails to fully understand the unique need for protection from religious discrimination addressed by § 701(j) of the Act.³

Whereas discrimination based on race, color, or national origin usually affects broad classes of citizens in significant numbers, the problem of religious discrimination usually arises in cases involving isolated individual members of minority religions. Religious discrimination cases implicate not only Fourteenth Amendment rights but also First Amendment rights. Whereas racial discrimination cases arise because an employer unlawfully treats broad classes of citizens differently, religious discrimination cases often are the result of individuals asserting their right to be different. It is the widely varying practices of myriad minority religions that, particularly in the area of Sabbath and holy day observance, causes conflict.

The members of these groups normally suffer not because of intentional invidious discrimination but because of the insensitive and inflexible application of otherwise valid policies to their particular situation. See, generally United States Commission on Civil Rights, *Religion in the Constitution: A Delicate Balance*, ch. 3 (1983). In order to protect against the harm caused by such inflexibility and insensitivity, Congress enacted § 701(j) requiring employers to accommodate "all aspects

³ Section 701(j) codified at 42 U.S.C. § 2000e(j) provides: "(j) The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."

of religious observance and practice." The whole approach of § 701(j) is focused on the individual employee. The duty to accommodate requires consideration of the employee's particular needs:

Each case involving such a determination necessarily depends upon its own facts and circumstances, and comes down to a determination of "reasonableness" under the unique circumstances of the individual employer-employee relationship.

Redmond v. GAF Corp., 574 F.2d 897, 902-903 (7th Cir. 1978).

An affirmative attempt by the employer to accommodate the employee's religious practices is needed. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), cert. denied, 442 U.S. 921 (1979).

In this case, it is the very policy pointed to by the school board as a reasonable accommodation that causes the respondent to suffer the financial loss he points to as a discriminatory effect. To allow an employer to rely on the reasonableness or neutrality of existing policies to satisfy his burden to attempt accommodation would make a nullity of § 701(j). "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs*, 401 U.S., at 431. It is the conflict between such policies and the religious dictates of the employee's faith that necessitates accommodation.

The fact that the employer may ultimately be able to demonstrate that any accommodation deviating from existing policy would impose undue hardship on the conduct of the employer's business does not excuse the employer from attempting to find such an accommoda-

tion. The burden of proving that undue hardship would be caused by available accommodation is on the employer. *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d, at 402. See also *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403, 405 (9th Cir. 1978), cert. denied, 439 U.S. 1072 (1979); *McDaniel v. Essex International, Inc.*, 571 F.2d 338, 343 (6th Cir. 1978).

Judge Pollack, in his dissent in the Second Circuit, states: "The issue in this case is whether the School Board should be forced to pay a teacher for not working." *Philbrook*, 757 F.2d, at 488. That is an inaccurate simplification of the case. This case is not like *Pinsker v. Joint District No. 28 J*, 735 F.2d 388 (10th Cir. 1984), where the teacher claimed that Title VII required the school board to increase the number of paid religious holidays. The respondent claims that the school board's refusal to let him use the personal leave days under the existing contract for religious purposes is an unnecessary and arbitrary burden on his religious observance. The court of appeals correctly held that the burden of proof on remand would be on the school board to show that the use of personal business days for religious observance would cause undue hardship on the employer. *Philbrook*, 757 F.2d, at 485-86, n. 8. The same is true with respect to the respondent's proposal to pay for a substitute. Any school board arguments that this proposal causes undue hardship due to lessened efficiency and discipline do not hold water because the school board's present policy of allowing the respondent to take the necessary days off without pay also necessitates the use of a substitute. The effect on efficiency and discipline would be identical. The school board should be required to show much more on remand in order to demonstrate that this proposal would cause undue hardship.

Much confusion regarding an employer's duty to accommodate the religious practices and observances of an employee has been caused by the unwarranted interpretation of this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977), by employers and lower courts. This case presents a prime example of the misuse of *Hardison* as precedent. Besides a passing reference to *General Electric Co. v. Gilbert*, 429 U.S. 125 (1977), *Hardison* is the only Title VII case cited as authority by the district court. It quotes *Hardison* at length. Although it is difficult to comprehend the exact basis for the district court's ruling, it appears that the court ruled that the respondent had failed to prove a prima facie case of discrimination. The district court seems to use *Hardison* to support the proposition that a plaintiff must prove that the discriminatory actions of an employer were outside the terms of a valid collective bargaining agreement. The district court's confusion regarding *Hardison* is echoed in Judge Pollack's Second Circuit dissent. Judge Pollack also felt that the respondent had failed to prove a prima facie case. He too relies on *Hardison*:

The neutral leave policy challenged here is embodied in a valid collective bargaining agreement. "Collective bargaining, aimed at effecting workable and enforceable agreements between management and labor, lies at the core of our national labor policy . . ." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79, 97 S.Ct. 2264, 2274, 53 L.Ed.2d 113 (1977). Where, as here, the agreement neither impairs employment status nor imposes any artificial, arbitrary, and unnecessary barriers to employment, then, as the Supreme Court stated in *Hardison*, "we do not believe that the duty to accommodate requires [the employer] to take steps inconsistent with the otherwise valid [collective bargaining agreement]."

Id. Paid leave from employment is neither contractually nor Constitutionally mandated.

Since the School Board's leave policy does not discriminate on the basis of religion, plaintiff failed—as early as the close of his case—to make out a prima facie case.

Philbrook, 757 F.2d, at 489 (brackets in original).

The widespread use of *Hardison* to support the view that employers and unions need not consider any deviation from a valid collective bargaining agreement when attempting to accommodate an employee's religious practices cuts the very heart out of Title VII's protection of religious observance. As explained above, problems concerning accommodation of a religious practice rarely result from an intentional invidiously discriminatory policy. To excuse employers and unions from any accommodation that deviates from any of the terms of a valid collective bargaining agreement effectively negates Title VII's protection for a large segment of the work force.

Such a result is not justified by the Court's decision in *Hardison*. The Court there was concerned with a proposed accommodation that would deprive some employees of their legitimate contractual rights under a seniority system. The court refused to require an accommodation that would give preference to an employee because of his religious beliefs to the detriment of another employee. The Court's finding of undue hardship under such an accommodation rested upon the burden imposed on other employees. Since what constitutes "undue hardship" is not set out in the statute with clearly defined parameters, the resolution of this issue turns on the particular facts of the case. *Draper v. United States Pipe and Foundry Co.*, 527 F.2d 515, 520 (6th Cir. 1975), citing, *Cummins v.*

Parker Seal Co., 516 F.2d 544, 551 (6th Cir. 1975); *Redmond v. GAF Corp.*, 574 F.2d, at 902-903.

Hardison cannot fairly be read as ruling that undue hardship exists whenever a proposed accommodation is at variance with the collective bargaining agreement. When a proposed accommodation does not infringe upon valuable rights of other employees, *Hardison* is not applicable. More particularly, *Hardison* dealt with seniority rights. The Court's decision was influenced by the special recognition of seniority systems by Title VII. 42 U.S.C. § 2000e-2(h). An accommodation that deviates from a provision of a collective bargaining agreement other than the seniority system and imposes some burden on other employees does not necessarily cause undue hardship.

The attempt by the school board to rely on the reasonableness of its collective bargaining agreement and the citation of *Hardison* point out the need for this Court to clearly state the limits of the *Hardison* ruling.

In examining the impact of employment policies and practices from the viewpoint of its effect on an employee's religious practice, an employer should examine its current practices and determine whether they, by conflicting with known employee religious practices, produce present discriminatory effects. Thus, an employer that maintains a system or contractual requirement adversely affecting Sabbath-keepers must establish that an alternative practice is not available to accommodate such burdened employees.

In *Robinson v. Lorillard*, 444 F.2d 791, 798 (5th Cir. 1971), the Fifth Circuit stated:

The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the busi-

ness . . . and there must be available *no acceptable alternative policies or practices* which would better accomplish the business purpose advanced, or accomplish it equally well with a lesser differential . . . impact. [emphasis supplied]

An employer and labor organization must, therefore, scrutinize their policies, practices, and contract provisions so as to ascertain whether their legitimate business concerns may be accomplished equally well with a less differential impact. They must make a good faith search for alternative ways to accomplish their business purpose when an existing employment policy or contract provision establishes a built-in headwind for a religious minority.

As one court of appeals has said, "It is well settled . . . that Title VII rights cannot be bargained away and that a collective bargaining agreement therefore does not of itself provide a defense for Title VII violations." *Notelson v. Smith Steel Workers*, 643 F.2d 445, 452 (7th Cir. 1981), *cert. denied*, 454 U.S. 1046 (1981). In *Robinson v. Lorillard*, 444 F.2d, at 799, the Fifth Circuit said: "Title VII requires that both the union and the employer represent and protect the best interest of minority employees."

In *Philbrook*, 757 F.2d, at 478, the court detailed contract changes that made it more, not less, difficult to accommodate respondent's religious needs. The court in *Philbrook* also noted that "various union officers testified that they had proposed changes in the collective bargaining agreement's leave policies, but all were rejected." *Id.*, at 487.

This Court has stated that "[t]he elimination of discrimination and its vestiges is an appropriate subject of bargaining. . . ." *Emporium Capell Co. v. Western Addition Community Org.*, 420 U.S. 50, 69 (1975). See, also *International Union of Electrical Radio and*

Machine Workers v. NLRB, 684 F.2d 18, 25 (D.C. Cir. 1980). Acquiescing in a discriminatory contract itself subjects a party to such a contract to Title VII liability. *Bartmess v. Drewyers USA, Inc.*, 444 F.2d 1186 (7th Cir. 1971), *cert. denied*, 404 U.S. 1939 (1971).

When a collective bargaining agreement fails to provide sufficient flexibility to permit equal employment opportunities, the burden should fall on both the company and the union to explain why such flexibility could not have been so provided in keeping with the business needs of both the employer and the union. In any event, the elimination of discrimination is a mandatory subject of bargaining. *Jubilee Manufacturing Co.*, 202 NLRB 272, 82 LRRM 1482 (1973), *aff'd*, 87 LRRM 3168 (1974).

Given the unequal bargaining power of the parties and the economic dependence of the employee, the employer's inflexibility set forth in policy can have a chilling effect on the employee's freedom to complain and negotiate. This difficulty is exacerbated by an inflexible collective bargaining agreement that diminishes an employee's employment opportunities or impacts on equal treatment as to the conditions and terms of employment because of an employee's religious practices.

In *Alexander v. Gardner-Denver*, 415 U.S. 36, 47 (1974), this Court recognized that majoritarian interests protected by collective bargaining agreements were subject to special legislative protection of individual religious practices under Title VII. Congress has stated that in a clash between majoritarian interests and an individual's right to equal employment opportunities, the guarantees of Title VII "are absolute and represent a congressional command that each employee be free from discriminatory practices." *Id.*, at 51.

Title VII's public policy objective of equal employment opportunities regardless of race, sex, or religion, and the National Labor Relations Act must be read together to arrive at the proper congressional will. "Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions." *Boys Markets, Inc. v. Retail Clerk's Local 770*, 398 U.S. 235, 250 (1970).

It is right and proper for Congress to have given special attention to the religious needs of employees in Title VII because Congress itself had earlier granted unions the power to be the exclusive bargaining representatives of all employees. Since *Steele v. L. & N.R. Co.*, 323 U.S. 192 (1944), this Court has recognized that federal labor laws giving broad powers to labor organizations involve government action. In *Railway Employees' Dept. v. Hanson*, 351 U.S. 225 (1956), this Court declared that a collective bargaining agreement has "the imprimatur of the federal law upon it," and "the federal statute is the source of power" by which individual rights are "lost or sacrificed." *Id.*, at 232. The accommodation provided under Title VII thus involves obligations arising under federal legislation.

When Congress, by such labor legislation, makes it more difficult for an individual in the labor force to arrange with his or her employer for a particular religious need, it effectively inhibits the free exercise of an individual's religion and makes more difficult the accommodation of an individual's religious practices. According to former Senator Jennings Randolph, the legislative author of § 701(j), the statutory religious accommodation provision inserted in Title VII was a legislative attempt to preserve the free exercise of religion. 118 Cong. Rec. 705-706 (1972). It is therefore permissible and desirable for Con-

gress, by remedial legislation, to require both the employer and the union to accommodate the individual's religious needs so long as that accommodation does not cause either the employer or union, or those employees represented by the union, undue hardship.

CONCLUSION

Accordingly, *Amicus Curiae* urges this Court to affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

LEE BOOTHBY

Counsel of Record

Attorney for Council on

Religious Freedom,

Amicus Curiae

Business Address:

208 W. Mars Street

Berrien Springs, MI 49103

(616) 471-7787

Of Counsel:

JAMES M. PARKER

1120 W. Loyola Street

Chicago, IL 60626

ROBERT W. NIXON

6840 Eastern Avenue, NW

Washington, DC 20012

HAROLD J. LANCE

204 N. San Antonio Avenue

Ontario, CA 91762

ROLLAND TRUMAN

4522 Greenmeadow Road

Long Beach, CA 90808

Dated: June 27, 1986

MOTION FILED

18

No. 85-495

JUN 27 1986

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF
AMICUS CURIAE AND BRIEF FOR
THE CATHOLIC LEAGUE FOR RELIGIOUS
AND CIVIL RIGHTS, AMICUS CURIAE,
IN SUPPORT OF RESPONDENT**

STEVEN FREDERICK MCDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

*Counsel of Record for
Amicus Curiae*

20 PP

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	v
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. THE COURT OF APPEALS PROPERLY DETERMINED THAT PHILBROOK ESTABLISHED A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION	3
II. IN LIGHT OF THE FACTS INVOLVED THE COURT OF APPEALS PROPERLY APPLIED TITLE VII'S REASONA- BLE ACCOMMODATION OF RELIGION AND UNDUE HARDSHIP PROVISIONS	6
A. Congress Intended that Reasonable Accommo- dations of Religion should Evolve from Bilateral Cooperation between Employee and Employer	7
B. In Light of the Absence of Bilateral Coopera- tion in this Case, the Court of Appeals Proper- ly Determined that the Board of Education should be Required to Provide Philbrook with the Reasonable Accommodation which Least Penalizes Philbrook's Religious Observance without Causing the Board of Education Un- due Hardship	9
CONCLUSION	14

TABLE OF AUTHORITIES

CASES:	Page
<i>American Postal Workers Union, San Francisco Local v. Postmaster General</i> , 781 F.2d 722 (9th Cir. 1986)	8, 11, 12
<i>Anderson v. General Dynamics Convair Aerospace Division</i> , 589 F.2d 397 (9th Cir. 1978), <i>cert. denied</i> , 442 U.S. 921 (1979)	4
<i>Brener v. Diagnostic Center Hospital</i> , 671 F.2d 141 (5th Cir. 1982)	8, 12
<i>Brown v. General Motors Corp.</i> , 601 F.2d 956 (8th Cir. 1979)	4
<i>Chrysler Corp. v. Mann</i> , 561 F.2d 1282 (8th Cir. 1977), <i>cert. denied</i> , 434 U.S. 1039 (1978)	8, 12
<i>Estate of Thornton v. Caldor, Inc.</i> , 105 S. Ct. 2914 (1985)	13-14, 14
<i>General Electric Co. v. Gilbert</i> , 429 U.S. 125 (1976)	11
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	11
<i>McDonnell Douglas Corp. v. Green</i> , 411 U.S. 792 (1973)	6
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476, <i>reh'g. denied</i> , __ F.2d __ (2d Cir. 1985), <i>cert. granted</i> , 106 S. Ct. 848 (1986) (No. 85-495)	4, 13
<i>Pinsker v. Joint District Number 28J</i> , 735 F.2d 388 (10th Cir. 1984)	2, 5-6, 6

Table of Authorities Continued

CASES:	Page
<i>Redmond v. GAF Corp.</i> , 574 F.2d 897 (7th Cir. 1978)	4
<i>Texas Department of Community Affairs v. Pardine</i> , 450 U.S. 248 (1980)	6
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	3, 12, 13, 14
<i>Turpen v. Missouri-Kansas-Texas Railroad Co.</i> , 736 F.2d 1022 (5th Cir. 1984)	4
STATUTES:	
Civil Rights Act of 1964, Title VII, as amended	42
U.S.C. §§ 2000e <i>et seq.</i>	2, passim
42 U.S.C. § 2000e(j)	8
OTHER AUTHORITIES:	
29 CFR § 1605.2(c)(2) (1985)	11
118 Cong. Rec. (1972)	5, 7, 12

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Catholic League for Religious and Civil Rights (hereinafter League), pursuant to Rules 36.3 and 42 of the Rules of this Court, moves for leave to file the appended brief amicus curiae in this matter.

The League is a voluntary non-profit organization dedicated to the right to religious freedom and the right to life of all, born or pre-born. The League is especially interested in helping insure the American people's continued enjoyment of religious freedom in employment. To this end the League has filed amicus curiae briefs before this Court in its most recent considerations of the Free Exercise Clause in employment, *Goldman v. Weinberger*, 106 S. Ct. 1310 (1986) and *Hobbie v. Unemployment Appeals Commission*, No. 85-993. Although this case is controlled on a statutory rather than constitutional basis, this brief is another expression of the League's interest.

The League will address the two questions of law raised by this case, whether the court of appeals properly found a prima facie case of religious discrimination in employment and whether the court of appeals correctly applied Title VII's religious accommodation provisions. Although these issues will likely be considered by all parties, it is probable that these parties may not present these matters from the general perspective of a desire to preserve religious freedom in employment which motivates the League. The need for briefs of this nature supporting Ronald Philbrook is especially acute since several amicus curiae briefs have been filed in support of the Board of Education by powerful interest groups representing organized labor and management. These briefs have been filed in support of the Board of Education with the consent of both parties, while the Attorney for the Board of Education and certain individual defendants has apparently arbitrarily withheld consent for the League to file a brief supporting the opposite party, Ronald Philbrook.

This motion is necessitated by the afore-mentioned refusal of the attorney of record for the Board of Education and the

allied individual defendants to grant the League consent to file the appended brief amicus curiae. The attorney of record for Ronald Philbrook has granted such consent. The attorney of record for the labor union and other individual plaintiffs has not responded in any fashion to the League's request for consent to file. The originals of the letters from counsel of record for Ronald Philbrook consenting to the filing of this brief and the counsel of record for the Board of Education and the allied individual defendants refusing such consent have been filed with the Clerk of this Court.

For the foregoing reasons, the League moves for leave to file the appended brief amicus curiae.

Respectfully submitted,

STEVEN FREDERICK McDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

*Counsel of Record for
Amicus Curiae*

JUNE 27, 1986

No. 85-495

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

**MOTION FOR LEAVE TO FILE
BRIEF AMICUS CURIAE AND BRIEF
FOR THE CATHOLIC LEAGUE FOR
RELIGIOUS AND CIVIL RIGHTS, AMICUS
CURIAE, IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The interest of amicus curiae is contained in the Motion for Leave to File Brief Amicus Curiae attached to this brief.

SUMMARY OF ARGUMENT

The court of appeals correctly determined that Ronald Philbrook established a prima facie case of religious discrimina-

tion. The court of appeals' decision on this point is founded upon the central premise that Title VII's language explicitly prohibits religious discrimination in compensation, terms, conditions or privileges of employment in the same manner that it prohibits religious discrimination in hiring or discharge. The protection plainly offered by the language of Title VII, 42 U.S.C. §§ 2000e *et seq.*, is also consistent with legislative history.

The only major decision suggesting that a compensation deprivation might be insufficient injury for purposes of a Title VII prima facie case of religious discrimination is *Pinsker v. Joint District Number 28J*, 735 F.2d 388, 391 (10th Cir. 1984). However, the reasoning in the *Pinsker* suffers from two basic defects. First, the decision does not accord proper significance to Title VII's prohibition of religious discrimination in compensation, terms, conditions and privileges of employment. Second, the decision fails to accord the Title VII prima facie case of religious discrimination its proper role as a relatively easily surmountable preliminary barrier for a Title VII plaintiff to scale before a court reaches questions such as reasonableness of a religious accommodation or the hardship of such an accommodation. The excessively onerous prima facie case required by the *Pinsker* court effectively results in an improper premature consideration of matters such as the reasonableness of a religious accommodation and undue hardship of such an accommodation which are appropriately determined at later stages of the Title VII analysis. Thus, the court of appeals below applied the test for determining a prima facie case of religious discrimination in a matter which implemented Title VII in a far more appropriate fashion than the court in *Pinsker*.

Although the facts in this case do not evidence the bilateral cooperation between employer and employee which is the ideal means of reaching a religious accommodation under Title VII, the court of appeals application of Title VII's reasonable accommodation of religion and undue hardship provisions was appropriate under these facts.

Congress clearly intended that religious accommodations

be reached through a process of bilateral cooperation between employee and employer. This intent is reflected both in legislative history and judicial cases. Congress' desire for bilateral cooperation means that neither an employer or an employee may stubbornly insist upon a single accommodation and refuse serious consideration of alternatives. Under this policy of bilateral cooperation it is certainly improper for an employer to insist that such cooperation cease the moment the employer proposes an accommodation which could be reasonable under the statute.

Occasionally, cases will occur, like this one, in which a religious accommodation is not reached through bilateral cooperation. In such a case, absent special circumstances or undue hardship to the employer, the employee should receive the religious accommodation which least penalizes the employee's religious observance. In such circumstances a more onerous employer-proposed accommodation would actually be an employment practice which discriminates on a religious basis when compared with a more favorable employee-proposed accommodation. This approach conforms to the EEOC's guidelines on this issue.

The proposed approach also does not penalize the employer. The employer remains free to utilize the process of bilateral cooperation to work out any policy which will satisfy the interests of both parties. Even more importantly, the expansive definition of "undue hardship" established in this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-85 (1977), guarantees that the employer will suffer no more than de minimis cost or inconvenience as a result of any required religious accommodation.

ARGUMENT

I.

THE COURT OF APPEALS PROPERLY DETERMINED THAT PHILBROOK ESTABLISHED A PRIMA FACIE CASE OF RELIGIOUS DISCRIMINATION.

The court of appeals' proper determination that Ronald

Philbrook established a prima facie case of religious discrimination was centered upon its conclusion that: "Title VII prohibits not only discrimination in hiring and firing but also discrimination 'with respect to compensation, terms, conditions or privileges.' " *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 483, *reh'g. denied*, ___ F.2d ___ (2d Cir. 1985), *cert. granted*, 106 S. Ct. 848 (1986) (No. 85-495). Based upon this interpretation of Title VII, 42 U.S.C. §§ 2000e *et seq.*, the court of appeals determined that the more clearly discriminatory choice between one's job and religious beliefs "cannot be distinguished from the choice here between giving up a portion of [one's] salary and [one's] religious beliefs."¹

The court of appeals' position that Philbrook established a prima facie case of religious discrimination properly reflects congressional intent that the religious discrimination provisions of Title VII protect employees from any penalization in terms or conditions of employment based upon religious grounds. As was noted above, the court of appeals correctly found this congressional intent reflected in the language of Title VII's religious discrimination provision which explicitly covers religious discrimination with respect to compensation and other conditions of employment as well as hiring or discharge. The congressional intent to protect religious discrimination in less severe forms than refusal to hire or discharge

¹ 757 F.2d at 482-83. There can be little dispute that Philbrook established two of three required elements of a prima facie case of religious discrimination, holding a bona fide religious belief conflicting with an employment requirement and informing his employer of this belief. Thus, the only real issue is whether the injury Philbrook suffered constitutes the type of injury or "discipline" necessary for a prima facie case of religious discrimination to be established under the controlling court of appeals' precedents. See *Philbrook*, 757 F.2d at 481; *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Brown v. General Motors Corp.*, 601 F.2d 956, 959 (8th Cir. 1979); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978), *cert. denied*, 442 U.S. 921 (1979); *Redmond v. GAF Corp.*, 574 F.2d 897, 901 (7th Cir. 1978) (setting out elements of prima facie case of religious discrimination).

reflected in Title VII's clear language is also consistent with its legislative history. In proposing the 1972 religious discrimination amendment to Title VII, Senator Randolph was obviously most concerned with the very serious situations in which an employee suffered religious discrimination in hiring or discharge. See Cong. Rec. 705-706 (1972). However, a fair reading of this legislative history reflects a consistent desire to thoroughly protect religious observance. It contains nothing which would negate Title VII's explicit textual prohibition of religious discrimination in forms less severe than refusal to hire or discharge.

It is clear that the court of appeals properly determined that forms of religious discrimination less severe than refusal to hire or discharge can establish the requisite injury to raise a prima facie case of religious discrimination under Title VII. The only major decision with which this view might appear to conflict is *Pinsker v. Joint District Number 28J*, 735 F.2d 388, 391 (10th Cir. 1984), in which the United States Court of Appeals for the Tenth Circuit held that a religiously motivated employee did not establish a prima facie case of religious discrimination in a situation in which the employer afforded a limited number of personal leave days and required additional religious holidays to be taken on an unpaid basis.²

However, the reasoning in the *Pinsker* case suffers from two basic defects. First, unlike the court of appeals below, the *Pinsker* court failed to properly come to grips with Title VII's language prohibiting discrimination in compensation, terms, conditions and privileges of employment. It cannot be seriously disputed that some deprivation on these bases occurred in both the instant case and the *Pinsker* case as a result of the involved employees' religious observances. It further cannot be disputed that the language of Title VII literally protects against such deprivation. Accordingly, the *Pin-*

² However, an argument can be made that the availability of personal leave days for both religious observance and secular observance in *Pinsker* distinguishes that case from this one in which the employer has refused to make personal leave days available for religious observance.

sker court's reasoning appears out of step with the clear language of Title VII.

This difficulty leads into the second major problem with the *Pinsker* court's reasoning. Again unlike the court of appeals below, the *Pinsker* court failed to accord the Title VII prima facie case its proper analytical role as a relatively easily surmountable preliminary barrier for a Title VII plaintiff to scale before a court reaches questions such as the reasonableness of a religious accommodation or the hardship of such an accommodation. The appropriate limited role of a Title VII prima facie case is reflected in such decisions of this court as *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 252-256 (1980) and *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800-805 (1973). As this Court noted in *Burdine*: "The burden of establishing a prima facie case of disparate treatment is not onerous." 450 U.S. at 253. However, in requiring a qualitative injury greater than loss of pay the *Pinsker* court appears to have created an unduly onerous requirement for proof of a prima facie case. In effect, the court prematurely injected itself into an analysis of matters such as the reasonableness of the employer's accommodation of the employee's religious beliefs and the question of whether accommodation would cause the employer undue hardship. Certainly, there are proper points in a Title VII analysis at which these matters are to be considered. However, the *Pinsker* court's effective determination of such issues at the prima facie case stage distorts the Title VII religious discrimination analysis by prematurely considering matters properly weighed during later phases of this analysis.

Thus, the court of appeals correctly determined that Philbrook's loss of pay constituted the "discipline" on a religious basis necessary to establish a prima facie case of religious discrimination under Title VII.

II.

IN LIGHT OF THE FACTS INVOLVED THE COURT OF APPEALS PROPERLY APPLIED TITLE VII'S REASONABLE ACCOMMODATION OF RELIGION AND UNDUE HARDSHIP PROVISIONS.

In light of the less than ideal degree of cooperation between Philbrook and the Board of Education in working out a religious accommodation, the court of appeals appears to have applied an appropriate analysis of the issues of reasonable accommodation of religion and undue hardship to the employer in reaching its decision.

A. Congress Intended that Reasonable Accommodations of Religion should Evolve from Bilateral Cooperation between Employee and Employer.

An examination of the legislative history surrounding the 1972 religious discrimination amendments to Title VII reflects Congress' intent that the determination of a suitable accommodation of an employee's religious beliefs should result from bilateral cooperation between employer and employee. For example, Senators Randolph and Williams had the following exchange concerning the manner in which Congress would prefer a reasonable accommodation to be made at the time Congress considered the 1972 religious discrimination amendments:

MR. WILLIAMS. The Senator and I are employers. As a matter of practice, we recognize the days of religious observations of some of our staffs, even though they are regular working days, generally, of the Senate, its committees, and its officers.

MR. RANDOLPH. That is correct. I know of many instances of that kind. I think that usually the persons on both sides of this situation, the employer and the employee, are of an understanding frame of mind at heart. I do not think they try to present problems. I do not think they try to have abrasiveness come into these decisions. I think they are just building upon conviction, and hopefully, understanding and a desire to achieve an adjustment; and if in perhaps a very, very small percentage of cases this is not able to be accomplished, that should not deter the Senate in its action in approving this amendment.

118 Cong. Rec. 706 (1972).

The same desire for bilateral cooperation in working out employees' religious accommodation has pervaded court decisions. For example, the United States Court of Appeals for the Fifth Circuit in *Brener v. Diagnostic Center Hospital*, 671 F.2d 141, 145-146 (5th Cir. 1982) appeared to approve of a process by which an employer would seriously consider an employee's proposed accommodations as well as his own. However, the clearest case in which a court of appeals noted the necessity for bilateral cooperation in successfully establishing reasonable accommodation is *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977), *cert. denied*, 434 U.S. 1039 (1978). There the United States Court of Appeals for the Eighth Circuit specifically noted that:

A mutuality of obligation exists in the employee-employer relationship. Title VII does not supplant this mutuality, but, using it as a necessary background, simply adds detail to certain areas of the relationship which are to remain free of discrimination. 42 U.S.C. § 2000e(j) thus has little meaning if it is considered only at an abstract level apart from the complementary nature of the duties that employer and employee owe one another, for a successful accommodation will rarely be possible unless employer and employee make mutual efforts. A failure of cooperation by either party will certainly lessen the chances of achieving a reasonable accommodation.

Id. at 1285 (emphasis added). See also *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772, 776-777 (9th Cir. 1986) (calling for bilateral cooperation in achieving religious accommodation).

Clearly, Congress envisioned that Title VII's religious accommodation provisions required employers and employees to cooperate for their successful implementation. This means that an employee may not doggedly refuse to cooperate with an employer's efforts to reasonably accommodate his religious beliefs. Conversely, this also means that, absent undue hardship, an employer may not stubbornly adhere to its

established employment policies and refuse to consider deviations from such policies which would better accommodate the involved employee's religious beliefs. In this case it would appear that the Board of Education has inflexibly insisted upon adherence to its leave policy and has refused serious consideration of any alternatives. Such a failure to engage in bilateral cooperation is exactly what Title VII's religious accommodation provisions were designed to prevent. Title VII quite simply does not envision a "reasonable accommodation" being achieved outside the process of mutual bilateral employee-employer cooperation. It most certainly does not contemplate bilateral consideration of a proper reasonable accommodation of religion ending the moment an employer proposes an accommodation which could be held reasonable under the statute. Accordingly, the failure of an employer or employee to mutually and flexibly cooperate with its counterpart in achieving a reasonable accommodation, such as the Board's failure to cooperate with Philbrook, results in a situation in which Title VII's religious accommodation provisions have not been implemented in the manner most consistent with Congress' intent.

B. In Light of the Absence of Bilateral Cooperation in this Case, the Court of Appeals Properly Determined that the Board of Education should be Required to Provide Philbrook with the Reasonable Accommodation which Least Penalizes Philbrook's Religious Observance without Causing the Board of Education Undue Hardship.

While an employee's religious observances are to be reasonably accommodated, absent undue hardship to the employer, an accommodation is not ideal if it has been reached outside the process of bilateral cooperation between an employee and employer. However, when bilateral cooperation is absent an accommodation must still be worked out.

In such a circumstance one will often be confronted by an employer and employee who propose alternative accommodations. In choosing between alternative accommodations it would seem that Title VII's literal language would call for the accommodation which, absent undue hardship to the em-

ployer, would least penalize the involved employee's religious observance. In such a case a more onerous employer-proposed "accommodation" would actually be an employment practice which discriminates on a religious basis when compared with a more favorable employee-proposed accommodation. Although the bilateral cooperation and flexibility encouraged by Title VII's religious accommodation provision indicate that exceptions to such a general rule should be permitted to implement Title VII's purposes, it would seem that the statute's purpose of preventing religious discrimination in employment would ordinarily be best furthered by implementing the accommodation which, while avoiding undue hardship, most fully prevents the penalization of an employee for religious observance.

This approach conforms with the Equal Employment Opportunity Commission's guidelines on this question. These guidelines require that:

(2) When there is more than one method of accommodation available which would not cause undue hardship, the Commission will determine whether the accommodation offered was reasonable by examining:

- (i) The alternatives for accommodation considered by the employer or labor organizations; and
- (ii) The alternatives for accommodation, if any, actually offered to the individual requiring accommodation. Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities.

29 CFR § 1605.2(c)(2) (1985). The EEOC's guideline properly implements Title VII by envisioning bilateral cooperation in achieving an agreement, but by generally calling for the implementation of the accommodation which, absent undue hardship, least disadvantages the employee with respect to his or her employment opportunities.³ Although not dispositive of Title VII's interpretation, these guidelines are certainly entitled to some weight in determining the proper application of the statute's religious accommodation provisions. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 140-142 (1976); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971). Further, in this area the EEOC's guidelines should be given especially significant weight because of Congress' intent to give the EEOC great flexibility in determining whether an employment practice interferes with religious observance.⁴

³ In *American Postal Workers Union, San Francisco Local v. Postmaster General*, 781 F.2d 772, 776-777 (9th Cir. 1986) the United States Court of Appeals for the Ninth Circuit used a similar, but slightly different, approach. Under the court's suggestion an employer's accommodation would be implemented if, measured objectively, it reasonably preserved an employee's employment status. However, if the accommodation did not reasonably preserve this status the employee's proposal would need to be implemented if it did not cause undue hardship. This method is inferior to those suggested by the court of appeals below and the EEOC for two reasons. First, the Ninth Circuit's approach substitutes a fairly rigid system of implementation of employer and employee accommodations for free flowing bilateral cooperation. Second, the Ninth Circuit's approach does not provide an opportunity for the agency or judicial comparison between suggested accommodations which is necessary to truly insure that no employment opportunity will be deprived on the basis of religious observance.

⁴ This exchange between Senators Dominick and Randolph prior to the enactment of the 1972 religious accommodation amendments illustrates the discretion and flexibility Congress intended to give the EEOC in this area:

MR. DOMINICK. I thank the Senator. I think this amendment will be helpful. All of these various situations keep arising because of our pluralistic method of conducting our business in this country.

This approach does not prejudice the employer. The employer remains free to engage in bilateral cooperation to work out any policy which will satisfy the interests of both parties and avoid any significant litigation. Further, if an employee does not engage in such bilateral cooperation with the employer, this failure to cooperate may prevent him from achieving a satisfactory religious accommodation through the EEOC or the Courts. See *American Postal Workers Union*, 781 F.2d at 776-777; *Brener*, 671 F.2d at 145-146; *Chrysler Corp.*, 561 F.2d at 1285.

Even more significantly, however, the employer can utilize the expansive definition of "undue hardship" established in this Court's decision in *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 79-85 (1977); to insure that it will suffer no more than de minimis cost or inconvenience as a result of any required religious accommodation. *Hardison's* broad interpretation of "undue hardship" means that an employer should never suffer any significant financial or other difficulty from accommodating an employee's religious ob-

It is hard to foresee far enough ahead so that each specific type of case can be anticipated.

Am I correct in understanding that the amendment allows flexibility both to the EEOC and to its investigators to determine whether or not any particular group of religious adherents are having their customary observance of their religious activities unduly interfered with? In other words, flexibility is provided so that someone could make a discretionary judgment?

MR. RANDOLPH. The Senator from Colorado correctly follows me in the thinking that I have placed in the language of the amendment, that there would be such flexibility, there would be this approach of understanding, even perhaps the discretion, to a very real degree.

I agree with the Senator's feeling, and I am sure that that is what is meant and would flow from the adoption of the practice under the amendment.

servances.⁵ While reserving ultimate decision on this issue for the district court, the court of appeals appeared to carefully and correctly determine that neither of Philbrook's proposed accommodations would cause even the de minimis cost necessary for a finding of undue hardship under *Hardison*.⁶ Accordingly, the great protection the "undue hardship" provision of Title VII affords employers from the expense and inconvenience of accommodating employee religious observances means that employers, including the Board of Education in this case, will not suffer any significant difficulty from ordinarily being required to implement the accommodation which least penalizes an employee in a case in which bilateral cooperation has not resulted in a settlement, the employer does not suffer undue hardship and special circumstances do not warrant a different solution. Thus, the court of appeals properly interpreted the religious accommodation provisions of Title VII under the facts of this case.⁷

⁵ Indeed, the dissenters in *Hardison* feared that this Court's construction of undue hardship was so broad that it impaired the religious freedom in employment protected by Title VII. *Hardison*, 432 U.S. at 86-87, 96-97 (Marshall, J., dissenting).

⁶ The court of appeals' analysis appears clearly correct on the issue of the absence of undue hardship to the Board of Education occasioned by permitting Philbrook to pay the cost of a substitute actually utilized as his replacement. This payment would relieve the Board of Education of the financial cost of a substitute and would not appear to pose greater than de minimis cost. See, *Philbrook*, 757 F.2d at 486. The question of undue hardship occasioned by personal leave usage appears closer, but the court of appeals' reasoning still appears sound. See 757 F.2d at 485.

⁷ In light of the flexibility provided employers by Title VII's "reasonable accommodation" and "undue hardship" provisions it is clear that the statute, as interpreted by the court of appeals, does not constitute the absolute elevation of a particular religious interest over all secular interests which this Court considered to have the primary effect of advancing religion. Compare *Estate of Thornton v. Caldor, Inc.*, 105 S. Ct. 2914, 2917

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

STEVEN FREDERICK McDOWELL
Catholic League for Religious
and Civil Rights
1100 West Wells Street
Milwaukee, Wisconsin 53233
(414) 289-0170

*Counsel of Record for
Amicus Curiae*

JUNE 27, 1986

(1985). See *Estate of Thornton*, 105 S. Ct. at 2919 (O'Connor, concurring) (Title VII's provisions for the reasonable accommodation of religion are consistent with the Establishment Clause because they protect all religious observances and are legitimately viewed as anti-discrimination laws protecting employment opportunities for all groups); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 90 n.4 (1977) (Marshall, J., dissenting) (Title VII's provisions for the reasonable accommodation of religion are consistent with the Establishment Clause since their purpose and primary effect is the secular one of securing equal employment opportunities to members of minority religions).

(14)
No. 85-495

FILED

JUN 27 1988

JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE PRESBYTERIAN CHURCH (U.S.A.),
THE NATIONAL COUNCIL OF THE CHURCHES OF
CHRIST IN THE U.S.A., AND THE CHRISTIAN
LEGAL SOCIETY AS AMICI CURIAE
IN SUPPORT OF RESPONDENT

Of Counsel:

SAMUEL E. ERICSSON
MICHAEL J. WOODRUFF
KIMBERLEE WOOD COLBY
P. O. Box 1492
Merrifield, VA 22116
(703) 560-7314

DOUGLAS LAYCOCK
Counsel of Record
727 E. 26th St.
Austin, TX 78705-5799
(512) 471-3275

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	4
I. If the Employer Is Guilty of Disparate Treatment, There Is No Need to Reach Any Issue of Accommodation	4
II. The Employer Is Guilty of Disparate Treatment, Because Its Rule Facially Discriminates on the Basis of Religious Observance	9
A. The Rule Facially Discriminates on the Basis of Religious Observance	9
B. The Discriminatory Restriction on the Use of Personal Business Leave Is Not Saved by the Separate Provision for Religious Leave	10
C. The Facially Discriminatory Rule Cannot Be Justified By Its Tendency to Reduce the Average Number of Leave Days Claimed	11
D. If the Court Grants Relief from the Facially Discriminatory Rule, No Accommodation Issue Remains in the Case	13
III. This Court Can Decide the Disparate Treatment Issue Because Its Resolution Would Support the Judgment Below and Because It Is Fairly Included in Question I of the Petition for Certiorari	15
CONCLUSION	16

TABLE OF AUTHORITIES

Cases	Page
<i>Blum v. Bacon</i> , 457 U.S. 132 (1982)	16
<i>City of Los Angeles v. Manhart</i> , 435 U.S. 702 (1978)	5, 10, 13
<i>Connecticut v. Teal</i> , 457 U.S. 440 (1982)	5, 11
<i>Dothard v. Rawlinson</i> , 433 U.S. 321 (1977)	4, 5
<i>Furnco Construction Corp. v. Waters</i> , 438 U.S. 567 (1978)	4, 11
<i>Griggs v. Duke Power Co.</i> , 401 U.S. 424 (1971)	5, 6
<i>Hills v. Gautreaux</i> , 425 U.S. 284 (1976)	16
<i>International Brotherhood of Teamsters v. United States</i> , 431 U.S. 324 (1977)	4, 5
<i>McDonald v. Santa Fe Trail Transportation Co.</i> , 427 U.S. 273 (1976)	5
<i>McDonnell-Douglas v. Green</i> , 411 U.S. 792 (1973) ..	5
<i>Newport News Shipbuilding and Dry Dock Co. v. EEOC</i> , 462 U.S. 669 (1983)	10, 13
<i>New York City Transit Authority v. Beazer</i> , 440 U.S. 568 (1979)	5
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985), cert. granted, 106 S.Ct. 848 (1986)	9, 13-15
<i>Phillips v. Martin-Marietta Corp.</i> , 400 U.S. 542 (1971)	6, 10
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1973)	9
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981)	9
<i>Trans World Airlines, Inc. v. Hardison</i> , 432 U.S. 63 (1977)	4, 7, 8, 12
<i>United States v. Arthur Young & Co.</i> , 465 U.S. 805 (1984)	15, 16
<i>United Steelworkers v. Weber</i> , 443 U.S. 193 (1979)	5
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	9
Constitutions	
U.S. Const., amend. I, free exercise clause	2, 9

TABLE OF AUTHORITIES—Continued

Statutes	Page
Title VII of the Civil Rights Act of 1964, generally, 42 U.S.C. § 2000e <i>et seq.</i> (1982)	<i>passim</i>
§ 701(j), 42 U.S.C. § 2000e(j) (1982)	6, 7
§ 703(a), 42 U.S.C. § 2000e-2(a) (1982)	6
§ 703(a)(1), 42 U.S.C. § 2000e-(a)(1) (1982)	13
§ 703(e), 42 U.S.C. § 2000e-2(e) (1982)	5
§ 703(h), 42 U.S.C. § 2000e-2(h) (1982)	5
Supreme Court Rules	
Supreme Court Rule 21.1(a)	15
Legislative History	
118 Cong. Rec. 705-706 (1972)	6, 7
118 Cong. Rec. 731 (1972)	6
Articles	
Brody, <i>Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers</i> , 60 B.U. L. Rev. 239 (1980)	4
Furnish, <i>A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine</i> , 23 B.C. L. Rev. 419 (1982)	4
McConnell, <i>Accommodation of Religion</i> , 1985 Sup. Ct. Rev. 1	8
<i>Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964</i> , 84 Harv. L. Rev. 1108 (1971)	10

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION, *et al.*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

BRIEF OF THE PRESBYTERIAN CHURCH (U.S.A.),
THE NATIONAL COUNCIL OF THE CHURCHES OF
CHRIST IN THE U.S.A., AND THE CHRISTIAN
LEGAL SOCIETY AS AMICI CURIAE
IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICI CURIAE

The Presbyterian Church (U.S.A.) is a national, Christian denomination with churches in all fifty states. It has approximately 3,150,000 active members and approximately 11,750 congregations organized into 195 Presbyteries and twenty Synods. The highest governing body of the Church is the General Assembly, composed of approximately six hundred delegates elected by the Presbyteries. The Church has long taught that Christians have a duty

to participate in public affairs, and the General Assembly determines the Church's policy on important issues. The positions taken in this brief implement policies of the General Assembly opposing all forms of discrimination and vigorously supporting religious liberty.

The National Council of the Churches of Christ in the United States of America is a federation of thirty-one Protestant and Eastern Orthodox religious bodies in the United States with aggregate membership totaling approximately 43,000,000. It is governed by a Governing Board of 250 members chosen by the member denominations in proportion to their size and support. The Governing Board determines the policies of the organization through debate, amendment and adoption of carefully prepared statements and resolutions brought to it by its subordinate program divisions. Several of these policies affirm the principle of religious liberty, and it is on the basis of these policies that it enters this case.

The Christian Legal Society is a non-profit Christian professional association, founded in 1961, with a present membership of 3,500 judges, attorneys, law professors, and law students. Concerned about constitutional rights, it founded the Center for Law and Religious Freedom in 1975 to protect and promote the freedoms guaranteed by the First Amendment through advocacy and education. The Center has been active in public education issues.

Amici are especially interested in this case, because the petition for certiorari raises issues far broader than those actually raised by the facts of record. This is a simple case of disparate treatment, and it is not necessary to decide broader and more difficult issues of accommodation. The disparate treatment issue at the heart of this case is the first order of consideration and is of critical importance to large numbers of religious employees. Sole consideration of that narrow issue is dispositive of this case.

SUMMARY OF ARGUMENT

The statute and the case law identify three distinct kinds of discrimination under Title VII of the Civil Rights Act of 1964: disparate treatment, disparate impact, and failure to reasonably accommodate religious practice. This case requires the Court to articulate the relationship among these legal theories.

There is no need to reach any issue of accommodation if the employer is guilty of disparate treatment or disparate impact. The duty to accommodate is relevant only to facially neutral rules that are justified by business necessity even though they preclude or penalize an employee's religious observance. In such a case, the employee whose religious observance is penalized must request an exemption from the generally enforceable rule. Only such a request for special treatment triggers the duty to accommodate, and only then is it necessary to determine whether the proposed accommodation is reasonable, whether it would impose undue hardship, or whether the employer must accept the employee's proposed accommodation.

The employer in this case is guilty of disparate treatment. The employer's rule facially discriminates on the basis of religion. Employees are entitled to three days of personal business leave for secular business but not for religious observance. It is no defense that a separate rule authorizes three days of leave for religious observance. In combination, these rules authorize six days of paid leave, but only for employees who use exactly three of those days for religious observance. These rules favor some religions and disfavor others. But regardless of who benefits, the explicitly religious restriction on the use of personal business leave is illegal disparate treatment. Whether and how often employees observe their religion on personal leave days is irrelevant to any legitimate interest of the employer.

ARGUMENT

I. If The Employer Is Guilty of Disparate Treatment, There Is No Need to Reach Any Issue of Accommodation.

This case requires the Court to articulate the relationship among disparate treatment, disparate impact, and accommodation. That relationship is manifest in the structure of the statute, but no case has yet required the Court to state it explicitly.

This Court has decided many disparate treatment and disparate impact cases, and the relationship between those theories is well developed. It is stated in some of the Court's opinions and elaborated in the academic literature. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321, 328-29, 332-33 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 581-83 (1978) (Marshall, J., concurring in part); Brody, *Congress, the President, and Federal Equal Employment Policymaking: A Problem in Separation of Powers*, 80 B.U.L. Rev. 239, 240-69 (1980); Furnish, *A Path Through the Maze: Disparate Impact and Disparate Treatment Under Title VII of the Civil Rights Act of 1964 After Beazer and Burdine*, 23 B.C. L. Rev. 419 (1982).

But this Court has decided only one accommodation case, *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977). That case plainly fit only under accommodation theory, and thus provided no occasion to explore the relationship between accommodation and disparate treatment or disparate impact. A brief review of those better known theories will help clarify their relationship with accommodation theory.

The simplest form of discrimination is disparate treatment. Disparate treatment simply means treating an individual differently because of his race, color, sex,

religion, or national origin. This Court's leading disparate treatment cases include *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978) (different pension formulas for men and women); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 328-43 (1977) (refusal to hire blacks); *McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273, 275-85 (1976) (different discipline for blacks and whites guilty of same offense against employer); and *McDonnell-Douglas v. Green*, 411 U.S. 792 (1973) (refusal to hire black applicant). The defenses to a proven incident of disparate treatment are few and narrow. They include the bona fide occupational qualification defense, § 703(e), 42 U.S.C. § 2000e-2(e) (1982), *Dothard v. Rawlinson*, 433 U.S. 321, 332-37 (1977); and the defense that the disparate treatment is pursuant to a valid affirmative action plan, *United Steelworkers v. Weber*, 443 U.S. 193 (1979).

The other common form of discrimination is disparate impact. A plaintiff makes out a prima facie case of disparate impact by showing that a facially neutral rule or employment practice falls more harshly in fact on a protected group than on other employees. But the range of defenses to a charge of disparate impact is much broader than to a charge of disparate treatment. From the explicit statutory defenses in § 703(h), 42 U.S.C. § 2000e-2(h) (1982), the Court has developed the generalized defense of business necessity: an employer may continue a facially neutral practice with disparate impact if the practice is justified by an important and nondiscriminatory business purpose. This Court's leading disparate impact cases include *Connecticut v. Teal*, 457 U.S. 440 (1982) (promotion test with disparate impact on black employees); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 582-87 (1979) (drug testing program alleged to have disparate impact on black and Hispanic employees); *Dothard v. Rawlinson*, 433 U.S. 321, 328-32 (1977) (height and weight requirement with disparate impact on female applicants); and, of course, *Griggs v.*

Duke Power Co., 401 U.S. 424 (1971) (employment test with disparate impact on black applicants).

Both disparate treatment and disparate impact are based on the original text of the statute. § 703(a), 42 U.S.C. § 2000e-2(a) (1982). Both apply to all five classifications forbidden by the statute: race, color, sex, religion, and national origin. Both had been articulated in this Court's cases before the 1972 amendments to the Act. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (disparate impact); *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) (disparate treatment).

The accommodation theory is based on § 701(j), 42 U.S.C. § 2000e(j) (1982), which was unanimously added by a floor amendment in 1972. 118 Cong. Rec. 705, 731 (1972). The amendment did two things. First, it defined "religion" to include "religious observance and practice." The primary effect of this definition is to insert the phrase "including religious observance and practice" wherever the word "religion" appears in the original statutory text. Second, the amendment required employers to reasonably accommodate religious observance and practice, but only if that could be done without undue hardship.

Plainly the amendment did not repeal the disparate treatment or disparate impact theories or exempt religious discrimination from their application. An employer who refused to hire Catholics or Jews would be guilty of disparate treatment, and no inquiry into accommodation would be required. A merchant who required sales clerks to have a diploma from a Catholic high school would be guilty of disparate impact without business necessity, and no inquiry into accommodation would be required. Moreover, the statutory definition of religion makes disparate treatment and disparate impact theory applicable to discrimination based on religious observance and practice. Thus, an employer who required his employees to refrain from attending church would be guilty of disparate treat-

ment of religious observance, and no inquiry into accommodation would be required. An employer who accommodated Seventh Day Adventist Sabbatarians but refused to accommodate Orthodox Jewish Sabbatarians would be guilty of disparate treatment, and no inquiry into the extent of his duty to accommodate would be required.

The purpose of the accommodation amendment was to reach cases not reached by either disparate treatment or disparate impact theory.¹ The particular case Congress had in mind is plainly stated in the brief legislative history. The amendment was sponsored by Senator Randolph, and he was concerned about Sabbatarians whose employers required work on the Sabbath. 118 Cong. Rec. 705-706 (1972). A rule requiring work on Saturday or Sunday is facially neutral; it does not explicitly discriminate on the basis of religion or religious observance. Such a rule has severe disparate impact on Sabbatarians, but the rule is plainly justified by business necessity for many employers. The airline parts warehouse in *Hardison* could not close on weekends, 432 U.S. at 66, and neither can many manufacturers or merchants.

Thus, Senator Randolph's Sabbatarian constituents had no claim under traditional discrimination theories. The accommodation clause was intended to go further. Employers would not be required to close on any employee's Sabbath, but they would be required to rearrange work schedules to exempt Sabbatarians from work on their Sabbath if that could be done without undue hardship. An employer who reasonably accommodated Sabbatarians would obviously have a defense to a disparate treatment charge brought by a non-Sabbatarian required to work

¹ This Court treated the amendment as clarifying Congressional intent and read its meaning into the unamended statute. *Trans World Airlines v. Hardison*, 432 U.S. 63, 76 n.11 (1977). But lower courts had not consistently recognized the right to accommodation of religious practice prior to the amendment. *Id.* at 75 n.10.

on weekends, but the pre-existing law of disparate treatment and disparate impact was not limited in any other way.

The pattern in this original example of accommodation is quite general—indeed, it is definitional. Accommodation claims arise only if a facially neutral rule that is justified by business necessity has disparate impact on a religious group or religious practice. If the rule is not facially neutral, it is illegal under disparate treatment theory. If the rule is not justified by business necessity, it is illegal under disparate impact theory. Only where neither of those theories applies is it necessary to consider an accommodation claim and decide the difficult issues of reasonableness and undue hardship.

In many cases of religious discrimination, it will be obvious that the rule is facially neutral and that it is justified by business necessity. Thus, a large proportion of religious discrimination claims are also accommodation claims. Perhaps that is why some lawyers and judges immediately begin to talk about accommodation as soon as they see a religious discrimination claim.

But the appropriate sequence of inquiry is first to consider whether the plaintiff has a disparate treatment or disparate impact claim. This sequence is both logical and prudential. Accommodation always involves special treatment of the religious employee. This special treatment is justified by his special needs and the statutory commitment to religious pluralism, but special treatment may be misunderstood or resented by other employees. Moreover, how much accommodation is reasonable and how much would impose undue hardship pose difficult balancing questions for the courts. Compare the majority and dissenting opinions in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977); see generally McConnell, *Accommodation of Religion*, 1985 Sup. Ct. Rev. 1. There is no need to incur these difficulties if the case can be decided under disparate treatment or disparate impact.

Equally important, the inquiry into accommodation will inevitably be confused if the parties and the Court have not clearly analyzed the nature of the challenged rule. It is nonsense to ask how much an employer should accommodate an employee seeking relief from a facially discriminatory rule. Facially discriminatory rules are forbidden, and employees have no obligation to be "reasonable" in accommodating to them. As this brief shows in part II.D, this kind of confusion is evident in the opinions below.

II. The Employer Is Guilty of Disparate Treatment, Because Its Rule Facially Discriminates on the Basis of Religious Observance.

A. The Rule Facially Discriminates on the Basis of Religious Observance.

As the Court of Appeals correctly held, plaintiff challenges a facially discriminatory rule. *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 483 (2d Cir. 1985), cert. granted, 106 S.Ct. 848 (1976). The collective bargaining agreement explicitly states, in two separate provisions, that personal business leave days may not be used for any religious observance. *Id.* at 479 n.2, ¶ 10 and ¶ 11.b.4. The employer would give plaintiff three more days of paid leave if, and only if, he promised not to use the time for religious observance.

This explicit restriction on religious observance is the central fact in the case. No employer can restrict religious observance in off-duty hours, or condition a benefit such as personal business leave on the recipient's willingness to forego religious observance. All such restrictions violate Title VII. And when the employer is a government agency, such as the school board here, such restrictions violate the free exercise clause unless justified by the most compelling reasons. See *Thomas v. Review Board*, 450 U.S. 707, 718 (1981); *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972); *Sherbert v. Verner*, 374 U.S. 398, 403 (1963).

The cost of a day's leave to the employer does not depend on whether the employee attends church on his day of leave. Three days leave costs three days pay for a substitute teacher and three days of substitute teaching for the affected students. These costs are identical whether the employee uses the time off for religious or secular business. Thus, plaintiff is not asking for anything the employer has not already agreed to provide. Plaintiff's requests for personal leave have been denied solely because he intends to engage in religious rather than secular activities. There can be no justification for such a rule. The school simply has no legitimate interest in whether the employee attends church on his days of personal leave.

Another way to understand the discrimination here is to recognize that the employer has one policy for employees with religious business and another for employees with secular business. That is the most obvious form of discrimination. This Court held in its first Title VII opinion that an employer could not have "one hiring policy for women and another for men." *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542, 544 (1971). In more recent sex discrimination cases, the Court has applied "the simple test" of "treatment that but for his sex would be different." *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 683 (1983), quoting *City of Los Angeles v. Manhart*, 435 U.S. 702, 711 (1978), quoting *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1170 (1971). The policy here fails the parallel simple test under the 1972 definition of religion: but for his religious observance, plaintiff's treatment would be different.

B. The Discriminatory Restriction on the Use of Personal Business Leave Is Not Saved by the Separate Provision for Religious Leave.

The employer provides three days of leave for religious observance in addition to the three days of leave for per-

sonal business. But this commendable accommodation does not exonerate the employer from liability for its discriminatory restriction on the use of personal business leave. It is well settled that a violation of Title VII cannot be justified by other acts of exemplary compliance, or even by affirmative action on behalf of minorities. *Connecticut v. Teal*, 457 U.S. 440, 452-56 (1982); *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 579 (1978).

In any event, the three days of religious leave do not offset or undo the discriminatory restrictions on the use of personal business leave. The employer's policy remains discriminatory both on its face and in effect. The combined effect of the two rules is that employees are entitled to six days paid leave if and only if they use exactly three of those days for religious observance. A Jewish teacher who wanted three days leave for secular business and three more days at Yom Kippur and Rosh Hashanah would get six days paid leave. The only reason why that teacher would get six days and plaintiff only three is that plaintiff offers religious rather than secular reasons for the three additional days. Plaintiff could also have six days leave if he would forego religious observance on three of them and offer exclusively secular reasons for the leave. Thus, the employer is guilty of disparate treatment of religious observance whether its rules are considered individually or collectively.

C. The Facially Discriminatory Rule Cannot Be Justified By Its Tendency to Reduce the Average Number of Leave Days Claimed.

For any individual teacher, the cost of six days leave is the same whatever the mix of secular and religious reasons for leave. But the employer may view its restriction on the religious use of personal leave days as a rationing scheme that reduces the average number of leave days claimed. Some employees, like plaintiff here, will not claim their three days for secular business. Many other employees will not claim their three days for reli-

gious observance, because the entire school calendar has been set up to accommodate the numerically dominant faiths. School never meets on Sunday; it therefore never meets on Easter. There is a long vacation at Christmas. This schedule fully accommodates most Christians. School never meets on Saturday, so most Sabbatharians are also accommodated. Employees whose religious needs are fully accommodated by the school's regular calendar will have no need to use leave days for religious observance.²

Thus, dividing the six days of leave into three days of religious leave and three days of secular leave may reduce the total number of leave days claimed. Each employee is entitled to six days of personal leave, but only if he has just the right combination of religious and secular needs. Some employees will be able to claim all six days, but many employees will claim fewer, and costs will be lower on average.

The difficulty with this scheme is manifest. An employer cannot use race, color, sex, religion, or national

² Plaintiff's challenge to the employer's explicit restriction on religious observance does not depend on the employer's substantial accommodation of the numerically dominant faiths. But this accommodation of the dominant faiths would be highly relevant to the reasonableness of any request for scheduling accommodations by plaintiff or other adherents of minority faiths. That the religious holidays of minority faiths often fall on workdays is not some coincidence caused by minority deviation from the employer's religiously neutral calendar. Minority requests for accommodation are the inevitable result of the employer's decision to accommodate its calendar to the calendar of the largest faiths. Such accommodation protects the religious liberty of the majority and is convenient for the employer; we tend to take it as the natural order of things and forget that it accommodates religious observance. But accommodation for the majority cannot be ignored in considering accommodation for minorities. With their one shift five days a week and their intermittent vacations, schools are among the most accommodating employers in the economy. They are at the opposite extreme from the employer in *Hardison*, with its 24-hour 365-day operation and shift preferences allocated by a statutorily protected seniority system.

origin as a criterion for rationing scarce resources. It cannot achieve average cost savings by discriminating against protected individuals on a forbidden basis. To offer six days leave only to those who will use exactly three of the days for religious observance is like offering six days leave only to teachers of Puerto Rican descent. Either rule would reduce the number of personal leave days claimed, but either rule would be facially discriminatory, and either rule would violate the core prohibition of § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982). If the employer must reduce the use of personal leave days, it must ration on some basis not forbidden by the statute, i.e., on some basis other than race, color, sex, religion, or national origin. Cost is not a justification for disparate treatment. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 n.26 (1983); *City of Los Angeles v. Manhart*, 435 U.S. 702, 716-17 (1978).

In fact, the rule forbidding religious activities on days of personal business leave produces only trivial savings for the employer. Because the school's calendar accommodates most religious observances, and because the three days of religious leave accommodates most of the rest, few employees would use personal business days for religious observance. All the employer's savings are extracted from a very small group of employees—the handful of religious minorities with four to six holy days that do not fall on the more common holy days already recognized by the school's calendar and who are willing to forego personal leave for secular business. Any decision to extract savings solely from this small and protected group violates the central policy of the Act.

D. If the Court Grants Relief from the Facially Discriminatory Rule, No Accommodation Issue Remains in the Case.

The facial defects in the employer's rule are the two provisions forbidding employees to use personal leave for religious observance. 757 F.2d at 479 n.2, ¶ 10 and

¶ 11.b.4. If the Court enjoins enforcement of those provisions and awards back pay lost because of them, plaintiff's claims are fully resolved. It is simply not necessary to decide whether the duty to accommodate requires more than three days of religious leave, or indeed, whether it requires any religious leave at all. Those issues are not in the case.

The judges of the Court of Appeals were confused on this point. The majority correctly noted that the employer's rule is "facially discriminatory," 757 F.2d at 483, and that plaintiff does not seek "preferential" or "privileged" treatment, *id.* at 487. Even so, the majority tried to analyze these facts in terms of accommodation. And immediately after identifying the rule's facial discrimination, the majority commented that the rule provides "some teachers all the leave they need for religious reasons while not extending that benefit to members of religious groups that have more than three holy days per year." *Id.* at 483. The dissenter mistakenly thought that this observation was the basis of the majority's holding. *Id.* at 488 (Pollack, J., dissenting).

But this observation is irrelevant to the disparate treatment issue. The observation would be relevant to a teacher who wanted eight days of leave for religious observance. Then the question would be whether two more days of religious leave would be a reasonable accommodation or whether it would impose undue hardship. Similarly, the Court of Appeals' observation would be relevant if the employer allowed three days of personal business leave usable for any purpose and allowed no additional days for religious observance. Whether employees who need more time for religious observance are entitled to more leave days than other employees is an accommodation question. But that question is not presented by this case. The only issue is whether the employer can forbid religious use of personal leave days available to all. That is a disparate treatment question,

and the answer is clear. The Court should answer that question first.³

III. This Court Can Decide the Disparate Treatment Issue Because Its Resolution Would Support the Judgment Below and Because It Is Fairly Included in Question I of the Petition for Certiorari.

Question I of the petition for certiorari asked whether the Court of Appeals erred in holding that plaintiff established "a *prima facie* case of religious discrimination under Title VII." This question includes within its wording any theory that would make out a *prima facie* case of religious discrimination, including disparate treatment. Thus, the petition fairly raises the disparate treatment issue. See Supreme Court Rule 21.1(a).

Even if the petition stated only accommodation issues, disparate treatment and disparate impact are "a logical predicate" to any accommodation issue. (The quotation is from *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 (1984).) Thus, disparate treatment and disparate impact issues are logically included in any ac-

³ An accommodation issue could conceivably arise on remand. The Court of Appeals noted the employer's contention that despite the broad wording of the rule, personal leave days are in fact available only for a very narrow set of purposes. 757 F.2d at 485. If this set of purposes is narrow enough, religious observance may be more like important secular business for which leave is not available than like the narrow set of purposes for which leave is available. If the employer could show those facts, there would be no discrimination in not allowing personal business leave to be used for religious observance.

This defense is not very plausible, but the Court of Appeals allowed the employer a second opportunity to prove it on remand. 757 F.2d at 485. If the employer shows that despite the discrimination on the face of the rule, there is in fact no disparate treatment in the operation of the rule, then the rule could stand as applied and plaintiff's disparate treatment claim would fail. Then and only then would it be necessary to decide plaintiff's accommodation claims.

accommodation issue that can be resolved on one of the narrower theories.

Finally, plaintiff would get no more relief on a disparate treatment theory than on an accommodation theory. Thus, the disparate treatment issue comes within the well-settled rule that a judgment may be defended on any ground that will fairly support it. *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984); *Blum v. Bacon*, 457 U.S. 132, 137 n.8 (1982).

For each of these reasons, this Court is not bound to perpetuate the error of imposing accommodation analysis on disparate treatment facts.

CONCLUSION

This Court should affirm the judgment of the Court of Appeals on the ground of disparate treatment rather than accommodation. The employer would still be entitled to rebut the *prima facie* showing of disparate treatment on remand, but only by showing that religious observance is most analogous to important secular business for which personal business leave is unavailable.

Thus, the judgment should be affirmed and remanded but further proceedings should be in accordance with this Court's opinion. For a similar disposition, see *Hills v. Gautreaux*, 425 U.S. 284, 306 (1976).

Respectfully submitted,

Of Counsel:

SAMUEL E. ERICSSON
MICHAEL J. WOODRUFF
KIMBERLEE WOOD COLBY
P. O. Box 1492
Merrifield, VA 22116
(703) 560-7314

DOUGLAS LAYCOCK
Counsel of Record
727 E. 26th St.
Austin, TX 78705-5799
(512) 471-3275

June 27, 1986

MOTION FILED

MAY 1 - 1986

IN THE

Supreme Court of the United States

October Term, 1985

ANSONIA BOARD OF EDUCATION,*Petitioner,*

v.

PHILBROOK,*Respondent.***ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT****BRIEF OF THE RUTHERFORD INSTITUTE,
AND THE RUTHERFORD INSTITUTES OF ALABAMA,
CONNECTICUT, DELAWARE, GEORGIA, KENTUCKY,
MICHIGAN, MINNESOTA, MONTANA, TENNESSEE,
TEXAS, AND VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE RESPONDENT**

F. Tayton Dencer
John W. Whitehead
Counsel of Record
Larry L. Train
The Rutherford Institute
9411 Battle Street
Manassas, Virginia 22110
(703) 369-0100

Thomas O. Kotouc
The Rutherford Institute
of Alabama
317 North Hull Street
Montgomery, Alabama 36104

Joseph Secola
The Rutherford Institute
of Connecticut
31 Daggett Street
Milford, Connecticut 06460

Alfred Lindh
The Rutherford Institute
of Delaware
1 Customs House Square
Wilmington, Delaware 19801

William B. Hollberg
Wendell R. Bird
The Rutherford Institute
of Georgia
1275 Peachtree St.
Atlanta, Georgia 30367

John K. Webb
The Rutherford Institute
of Kentucky
8 Ardery Place, Suite 4
Paris, Kentucky 40361

David A French
The Rutherford Institute
of Michigan
2010 Devolson
Ann Arbor, Michigan 48104

Tony P. Trimble
The Rutherford Institute
of Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute
of Montana
104 Second Street, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute
of Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute
of Texas
P.O. Box 923
Dallas, Texas 75221

Guy O. Farley, Jr.
The Rutherford Institute
of Virginia
10521 Judicial Place
Fairfax, Virginia 22030

Attorneys for Amici Curiae

34PP

IN THE
Supreme Court of the United States

October Term, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION,
Petitioner,

v.

PHILBROOK,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF OF THE RUTHERFORD INSTITUTE,
AND THE RUTHERFORD INSTITUTES OF ALABAMA,
CONNECTICUT, DELAWARE, GEORGIA, KENTUCKY,
MICHIGAN, MINNESOTA, MONTANA, TENNESSEE,
TEXAS, AND VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE RESPONDENT**

The Rutherford Institute and its corresponding State Chapters, pursuant to Supreme Court Rule 36.3, hereby move for leave to file a brief as *amici curiae* in support of the Respondent in this case and for affirmation of the decision of the United States Court of Appeals for the Second Circuit. The Respondent has consented to the filing of this and his letter of consent has been filed with the Clerk pursuant to Rule 36. The motion is necessitated by Petitioner's refusal to consent to the filing of the appended brief.

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The

Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens dedicated to the protection of religious liberty and other constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Kentucky, Michigan, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. Previous cases in which *amici curiae* have filed briefs with the Court include: *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984); *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985); *Witters v. State of Washington Commission for the Blind*, 54 U.S.L.W. 4135 (U.S. Jan. 27, 1986) (No. 84-1070); *Bowen v. Roy*, (No. 84-780); *Bender v. Williamsport Area School District, et al.*, (No. 84-773), slip. op. (March 25, 1986); *Goldman v. Secretary of Defense, et al.*, (No. 84-1097), slip op. (March 25, 1986); *Bowers v. Hardwick*, (No. 85-140); *Bowen v. American Hospital Association, et al.*, (No. 84-1529); *Ohio Civil Rights Commission v. Dayton Christian Schools*, (No. 85-488). The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

The issues presented in this case concern the entitlement of an employee to an accommodation by his employer allowing him the freedom to live according to the dictates of his religious beliefs. Specifically, the question arises as to what burden is incumbent upon the employer in a claim of religious discrimination under Title VII to reasonably accommodate the religious observances of the employee. A careful review of the legislative history and judicial construction of Title VII's prohibition of religious discrimination points inescapably to the conclusion that the employer has an affirmative duty to accept any reasonable accommodation proposed by the Respondent that would significantly minimize the burden upon Respondent's religion.

It is the position of the Rutherford Institute that only by imposing on employers the qualified affirmative duty to accept a reasonable alternative to burdening an employee's religion can this country's commitment to a modicum of religious pluralism be fulfilled in the workplace. Any lessening of this affirmative duty and corresponding burden on the employer in a Title VII case would pose a significant threat to traditional notions favoring protection of the employee in the practice of his religious faith.

For these reasons and those stated in the annexed brief, it is respectfully requested that the motion of the Rutherford Institute and its corresponding State Chapters for leave to file this brief as *amici curiae* in support of the Respondent be granted.

Respectfully submitted,

F. Tayton Dencer
John W. Whitehead
Counsel of Record
Larry L. Crain
The Rutherford Institute
P.O. Box 510
Manassas, Virginia 22110
(703) 369-0100

Attorneys for *Amici Curiae*

Dated:

Thomas O. Koutoc
The Rutherford Institute of
Alabama
317 North Hull Street
Montgomery, Alabama 36104

Joseph Secola
The Rutherford Institute of
Connecticut
31 Daggett Street
Milford, Connecticut 06460

Alfred Lindh
The Rutherford Institute of
Delaware
1 Customs House Square
Wilmington, Delaware 19801

William B. Hollberg
Wendell R. Bird
The Rutherford Institute of
Georgia
1275 Peachtree St., N.E.
Atlanta, Georgia 30309

John K. Webb
The Rutherford Institute of
Kentucky
8 Ardery Place, Suite 4
Paris, Kentucky 40361

David A. French
The Rutherford Institute of
Michigan
2010 Devolson
Ann Arbor, Michigan 48104

Tony P. Trimble
The Rutherford Institute of
Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute of
Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute of
Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute of
Texas
P.O. Box 923
Dallas, Texas 75221

Guy O. Farley, Jr.
The Rutherford Institute of
Virginia
10521 Judicial Place
Fairfax, Virginia 22030

TABLE OF CONTENTS

	Page
Table of Authorities	viii
Interest of Amici Curiae.....	1
Statement of Facts.....	2
Summary of Argument.....	2
 Argument	
I. The Standard For Defining An Employee's <i>Prima Facie</i> Case Ultimately Depends Upon Social Rather Than Positive Norms, Though It Is Subtly Affected By The Nature Of The Statutory Requirement.....	4
A. The Connection Between Social Norms, Positive Norms And Evidentiary Presumptions.....	4
B. The Possible Elements Of The <i>Prima Facie</i> Case.....	7
C. The Impact Of The Affirmative Cast Of The Statute On The Allocation Of The Burden Of Proof...	9
II. The Nature Of Title VII's Accommodation Requirement Is Best Understood Not Merely In Qualitative Terms, But In Terms Of A Spectrum Of Competing Primary Functions	11
A. The Possible Functions Of Title VII Can Be Elaborated Into Four Analytically Distinct Versions Or Categorical Interpretations Of The Statute, Which Make It Possible To Sort Proposed Understandings Of The Accommodation Requirement Without Resorting To Rough Qualitative Judgments.....	12
B. The Four Competing Versions Of Title VII And Their Associated Ranges Of Meaning.....	14

1. Purely Prohibitive	14
2. Prohibitive Emphasis.....	14
3. Affirmative Emphasis	15
4. Wholly Affirmative Commitment	19
 C. Petitioner's Justification For Not Accommodating Respondent's Religious Practices Constitutes A Classic Statement Of The Second Version Of The Statute And Suggests An Understanding That Is Structurally (Not Merely Qualitatively) Distinct From The Version That Corresponds To Congressional Intent	
	20

TABLE OF AUTHORITIES

Cases

Page

<i>Anderson v. General Dynamics Convair Aerospace Division</i> , 589 F.2d 397 (9th Cir. 1978)	9
<i>Brener v. Diagnostic Center Hospital</i> , 671 F.2d 141 (5th Cir. 1982)	21
<i>Brown v. General Motors Corp.</i> , 601 F.2d 596 (8th Cir. 1979)	16
<i>Chrysler Corp. v. Mann</i> , 561 F.2d 1282 (8th Cir. 1977)	8
<i>Cummins v. Parker Seal Co.</i> , 516 F.2d 544 (6th Cir. 1975)	6
<i>Dewey v. Reynolds Metal Co.</i> , 429 F.2d 325 (6th Cir. 1970), <i>aff'd by an equally divided court</i> , 402 U.S. 689 (1971)	7
<i>Jordan v. North Carolina National Bank</i> , 565 F.2d 72 (4th Cir. 1977)	15
<i>Kendall v. United Air Lines, Inc.</i> , 494 F.Supp. 1380 (N.D. Ill. 1980)	15, 16
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985)	6, 9, 11, 13, 20
<i>Pinsker v. Joint District No. 28J</i> , 735 F.2d 388 (10th Cir. 1984)	6, 13
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963)	18
<i>Thornton v. Caldor</i> , 105 S.Ct. 2914 (1985)	18, 20
<i>TransWorld Airlines, Inc. v. Hardison</i> , 423 U.S. 63 (1977)	6, 7, 8
<i>Turpen v. Missouri-Kansas-Texas Railroad Co.</i> , 736 F.2d 1022 (5th Cir. 1984)	9
<i>Waltz v. Tax Commission</i> , 397 U.S. 664 (1970)	18
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	18
<i>Williamsport Area School District v. Bender</i> , 741 F.2d 538 (3rd Cir. 1984)	18

<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972)	18
<i>Wren v. T.I.M.E. - D.C., Inc.</i> , 595 F.2d 441 (8th Cir. 1979)	16

Statutes

42 U.S.C. Section 2000e(j)	10, 16
----------------------------------	--------

Other Authorities

<i>Employer's Duty of Reasonable Accommodation Under Title VII - Pinsker v. Joint District No. 28J</i> , 33 Kans. L. Rev. 583 (1985)	9
<i>Establishment Clause, Secondary Religious Effects, and Humanistic Education</i> , 91 Yale L.J. 1196 n. 28 (1982)	18
<i>Less Drastic Means and the First Amendment</i> , 78 Yale L.J. 464 (1969)	19

IN THE
Supreme Court of the United States

October Term, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION,
Petitioner,

v.

PHILBROOK,
Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT**

**BRIEF OF THE RUTHERFORD INSTITUTE,
AND THE RUTHERFORD INSTITUTES OF ALABAMA,
CONNECTICUT, DELAWARE, GEORGIA, KENTUCKY,
MICHIGAN, MINNESOTA, MONTANA, TENNESSEE,
TEXAS, AND VIRGINIA,
AMICI CURIAE, IN SUPPORT OF THE RESPONDENT**

INTEREST OF AMICI CURIAE¹

Amici Curiae are non-profit religious corporations named for Samuel Rutherford, a 17th-century Scottish minister and rector at St. Andrew's University. The Rutherford Institute is composed of attorneys, judges, physicians, law students, educators and other citizens

¹Respondent has consented to the filing of this brief and their letter of consent has been filed with the Clerk pursuant to Rule 36. The Petitioner has withheld consent to the filing of this brief and that action is the subject of a Motion for Leave to File, timely presented, in accordance with Rule 36.3 of the Rules of the Supreme Court.

dedicated to the protection of religious liberty and other constitutional guarantees. With state chapters in Alabama, Connecticut, Delaware, Georgia, Kentucky, Michigan, Minnesota, Montana, Tennessee, Texas and Virginia and its national office in Manassas, Virginia, the Rutherford Institute has undertaken to assist litigants and participate in significant cases relating to First Amendment religious freedoms. The Rutherford Institute seeks to promote, assure and enhance the freedom of religious persons in the proper exercise of their faith in conformity with the protection afforded by the United States Constitution.

Because of its acute sensitivity to violations of the freedom of religion, the Rutherford Institute has increasingly become one of the nation's most effective and responsible commentators in this important field. Moreover, counsel for *amici curiae* have specialized in litigation in state and federal courts and have participated as counsel for *amici curiae* in previous cases before this Court. The Rutherford Institute believes the expertise of its counsel will be of assistance to the Court in this case.

Amici Curiae, therefore, have a vital interest in seeking affirmance of the lower court's decision. Reversal of the lower court's decision would significantly vitiate the salutary effect of Title VII in sustaining a modicum of religious pluralism in the workplace.

STATEMENT OF FACTS

Amici Curiae adopt by reference the statement of facts as set forth in Respondent's brief filed with this Court.

SUMMARY OF ARGUMENT

The allocation of the burden of proof effected by the definition of the *prima facie* case operates to impose an evidentiary presumption. Indeed, the very requirement of the *prima facie* case establishes a presumption in favor of non-discrimination by employers. The higher the standard

of proof required to establish that *prima facie* case, the stronger the presumption. Because it operates as an evidentiary presumption, the definition of the *prima facie* case is ineluctably tied to social norms, to views concerning the normal state of affairs with respect to religious discrimination by employers. The mere existence of a statutory duty or positive norm says nothing in and of itself regarding the nature of this presumption. Nevertheless, taking into account the context of the 1972 amendments to Title VII, it makes sense to infer a relatively low standard of proof, which would not, in any case, require employees to establish the reasonableness of particular proposed accommodations as a part of the *prima facie* case.

On the substantive issue, Petitioner school board has advanced a view of the statute that is clearly underinclusive with respect to the range, as opposed to the degree, of accommodation intended by Congress. The tendency is to approach this question as if it required a qualitative judgment as to the degree of accommodation required. The normal approach assumes a continuous spectrum of alternatives, ranging from purely prohibitive to wholly affirmative constructions of the statute, with the choice of a decisional point being solely a qualitative issue. However, when viewed at a reasonable level of abstraction, the spectrum is significantly discontinuous, and thus provides a basis for a categorical approach. This approach makes it possible to sort different proposed constructions of the statute without resorting to untutored qualitative judgments; applying this approach to the present case reveals that congressional intent requires Petitioner to accommodate Respondent by allowing him to use the personal business category for his religious observance.

ARGUMENT

I

The Standard For Defining An Employee's *Prima Facie* Case Ultimately Depends Upon Social Rather Than Positive Norms, Though It Is Subtly Affected By The Nature Of The Statutory Requirement

The *prima facie* case defines the threshold for shifting the burden of proof to an employer. How high this threshold should be depends upon certain policy considerations, as well as on an understanding of what one counts as religious discrimination. The policy considerations have to do with allocating the burden of proof between the parties; one's understanding of religious discrimination affects the nature of the burden.

A. The Connection Between Social Norms, Positive Norms And Evidentiary Presumptions.

No matter how high one conceives the substantive standard in a religious discrimination case to be, there is in theory no reason that the employee's burden could not be minimal.¹ It could in some contexts even be reasonable to place the whole burden upon the employer. What is and is not reasonable depends, in particular, upon a prior understanding of the normal relationship of employer and employee in our society with regard to issues of religious pluralism. A rule allocating some initial burden to the employee suggests a prior understanding that the norm,²

¹It is possible to have a high substantive standard with regard to the existence of religious discrimination, but at the same time to require only a minimal showing to establish a *prima facie* case. A high substantive standard would simply make it easier for the employer to rebut the case made out by the employee.

²We refer here to the social, as opposed to the moral or positive, norm. The positive norm is what the substantive rule requires. By hypothesis, no case of religious discrimination could be made apart from violation of the positive norm. The social norm reflects our

however frequently violated,³ is non-discrimination by employers. In such a case, we would want some, if only minimal, evidence that the employer had not departed from this norm before we would require proof from him that he had not. A rule placing the initial burden on the employee reflects a policy of deference toward employers in that it requires employees to identify some reasons for believing that an employer has departed from the norm. The burden of proof reflects, in short, a presumption of regularity.

Qualitatively, the severity of the employee's burden would vary inversely with the strength of this presumption. An awareness that employers not infrequently departed from the social norm, that it was in a sense an ambiguous, if not illusory, norm, would weaken this presumption and support a relaxation of the standard of proof to which we would put the employee.

The degree of deference that is appropriate, though derived from social norms, is subtly affected by the nature of the statutory requirement. Two different views of the statute may be seen, though they have not been formally

(footnote 2 continued)

understanding of the degree of consonance between the positive norm and the actions of employers in our society. A substantial divergence between the positive and social norm is politically unlikely because a society in which employers routinely flouted the positive norm would, in all likelihood, not long retain it as the norm. Such a state of basic dissonance could exist, however, if employers were a political minority. In such a state, it would be reasonable, as well as politically feasible, to impose most, if not all, of the burden upon the employer. By contrast, a state of basic consonance between the positive and social norm would lead to a rule that imposed some burden of proof on the employee. Other things being equal, the greater the consonance, the greater the burden upon the employee to demonstrate a departure from the positive norm. Obversely, where the consonance is somewhat weak, the standard for assessing the burden to be placed upon the employee should be relaxed.

³Obviously, the norm would at some point cease to be a social norm if it were too frequently violated. The point here is that, so long as it remains a norm, some burden will be imposed upon employees.

elaborated, in the various lower court decisions attempting to give meaning to the statute. On the one hand, the statute may be viewed primarily as a prohibition, as establishing what an employer may *not* do. *Cf. Cummins v. Parker Seal Co.*, 516 F.2d 544 (6th Cir. 1975); *Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984). That is, the employer may not single out religious employees for discrimination. On the other hand, one may view the statute as establishing to some extent an affirmative obligation to provide for a modicum of religious pluralism in the marketplace. *E.g., Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985). These two different views lead directly to different conclusions as to what the statute requires from employers as a substantive matter. The effect on the resolution of the burden of proof allocation is less direct, but equally obvious, once the connection between the burden of proof and social norms is perceived.

The view of the statute as merely a prohibition of religious discrimination clearly leads to a stronger presumption in favor of the employer, and therefore tends toward allocation of a greater initial burden to the employee than does an affirmative view of the statute. This is because violations of a prohibitive standard would impinge more sharply on social norms than violations of an affirmative standard. An employer singling out religious employees for discrimination would seem, from the standpoint of social norms, to be quite aberrant; we would be much less surprised to find that an employer had failed affirmatively to accommodate the idiosyncrasies of a religious employee. Hence, one who holds the former view would tend to require a fairly strong showing of discrimination from an employee. By the same token, one who holds the latter view would tend to accept somewhat less of a showing.

Although the emphasis of the original enactment was on "eliminating discrimination in employment," *TransWorld Airlines, Inc. v. Hardison*, 423 U.S. 63, 71 (1977), the 1972 amendment to the definition of religion,

following this Court's decision in *Dewey v. Reynolds Metal Co.*, 402 U.S. 689 (1971), shifted the emphasis to an affirmative duty. As this Court put it, "[t]he intent and effect of this definition was to make it an unlawful employment practice under Section 703(a)(1) for an employer not to make reasonable accommodations, short of undue hardship, for the religious practices of his employees and prospective employees." *Hardison*, 432 U.S. at 74. Resolving the double negative in the above formulation, the "intent and effect" of the 1972 amendment was, quite plainly, to convert⁴ the statute from a purely prohibitive measure into one with an affirmative cast.

The social norm with regard to this affirmative duty is plainly problematic; the affirmative cast of the statute thus significantly weakens the presumption in favor of employers, which is to say that it weakens the presumption against an employee claim of religious discrimination. Accordingly, as a general qualitative matter, this suggests a relatively low threshold of proof for establishing a *prima facie* case. Knowing that the threshold should be relatively low does not, by itself, enable one to specify the precise elements of a *prima facie* case, but it does provide a backdrop against which contending formulations can be considered.

B. The Possible Elements Of The *Prima Facie* Case.

The elements of the *prima facie* case can be distilled out of the essential ingredients of a religious discrimination claim. Such a claim presupposes a conflict between an employee's religious beliefs, including for this purpose any

⁴It might be argued that the pre-1972 statute was also intended to impose an affirmative obligation, and that the 1972 amendment was added merely to clarify that intent, and thus to resolve the uncertainty surrounding this Court's affirmance of the Sixth Circuit Court of Appeals decision in *Dewey v. Reynolds Metal Co.*, 429 F.2d 325 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971). For the purposes of the present argument, one's view of this historical issue is unimportant.

course of action impelled by these beliefs, and some requirement of his job. A claim of religious discrimination arises out of the dynamics of the resolution of such a conflict. There are three possibilities as to how such a conflict could be resolved without burdening an employee's religion. First, it could in some cases be resolved by the unilateral actions of the employee working within the system to finesse the conflict. Cf. *Chrysler Corp. v. Mann*, 561 F.2d 1282 (8th Cir. 1977) (employee has obligation to accommodate his own beliefs through means available to him). Second, the employer might be able to accommodate the employee, without itself being burdened, by tailoring the requirements of the system to allow for the employee's religious belief. Third, the employer could incur a burden in order to accommodate the employee.

A claim of religious discrimination is, in essence, a denial of the first possibility combined with a claim either that the employer was aware of and refused or otherwise failed to allow the employee to take advantage of a possibility of the second type, or that the employer should have made an accommodation of the third type. As will be argued further below, it seems clear that the statute requires the employer to allow an employee an accommodation, if such is known to the employer, of the second type. Moreover, based on this Court's decision in *Hardison*, and on the purport of the statute, it also seems clear that the statute may require at least some accommodations of the third type.⁵

The possible elements of a *prima facie* case break out quite naturally from the composite religious discrimination claim sketched above. Without question, this burden would entail a showing that (1) the employee has a sincere religious belief that conflicts with an employment require-

ment, (2) the employer has informed the employee of the conflict and (3) the employee has incurred a burden on his religion as a result of his noncompliance. See e.g., *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 481 (2d Cir. 1985). *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022, 1026 (5th Cir. 1984); *Anderson v. General Dynamics Convair Aerospace Division*, 589 F.2d 397, 401 (9th Cir. 1978). See also, Note, *Employer's Duty of Reasonable Accommodation Under Title VII - Pinsker v. Joint District No. 28J*, 33 Kans. L. Rev. 583, 584-85 (1985). The issue is whether the employee's burden should also include proof that the employer reasonably could have arranged specific forms of accommodation, but did not, and that these accommodations would have either eliminated or at least significantly minimized the burden on the employee's religion. The alternative would be to place the burden on the employer to show that no reasonable means of accommodating the employee were available.

It is important for this purpose to distinguish between the necessity of making allegations and the burden of proof. The employee must *allege* facts establishing that his employer could have accommodated him. The question is whether the employee should have to shoulder the burden of proving the practicability and reasonableness of such accommodations, or whether, on the other hand, the employer should have the obverse burden of showing that the alleged accommodations were not reasonably practicable.

C. The Impact Of The Affirmative Cast Of The Statute On The Allocation Of The Burden Of Proof.

The statute does not directly answer this question; it defines religious discrimination, but it does not purport to

⁵Specifically, the *Hardison* decision would seem to require employers to accommodate employees to the extent of *de minimis* costs. *Hardison*, 432 U.S. at 84.

allocate the burden of proof.⁶ The answer must come, rather, from a consideration of policy, and that consideration must refer to social norms with regard to the requirement at issue.

It is nevertheless tempting to conclude that because the statute imposes an affirmative duty upon the employer, it is up to the employer to show that he has complied. Indeed, it would seem somewhat anomalous in light of the statutory intent to impose such a duty on employers to require employees to carry the burden of proof on this issue. Yet it does not follow from the bare fact that employers have a duty that they also have the burden to prove they have fulfilled it. The burden of proof plays the role of asserting an evidentiary presumption, of defining what is felt to be the ordinary state of affairs. Hence, depending upon how normal it is for an employer to affirmatively accommodate religious pluralism, it could well be consistent to recognize such a duty, and at the same time to impose a stiff burden on employees to prove non-compliance. If, on the other hand, the statute is seen as calling employers to a higher standard of accommodation than they naturally practiced in the past, then it could not be assumed that fulfillment of the duty was the norm. In such a case, it would make better sense to allocate the burden of proof in a way that buttressed the imposition of the duty.

Although the norm with respect to employer accommodation of employee religious practices is somewhat

⁶The statute does seem at first blush to speak to this issue. Specifically, the statutory definition of religion includes within the term religion, "all aspects of religious observance and practice . . . unless an employer *demonstrates* that he is unable to reasonably accommodate to an employee's or prospective employee's religious observances or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. Section 2000e(j). Although the quoted language appears to answer this question, it is probably best interpreted as setting forth a substantive definition of religious discrimination, and not as attempting to allocate the burden of proof. Of course, if the statutory language is meant to describe the burden of proof allocation, then it is clear that the employer has that burden.

problematic, the 1972 amendments evince Congress's intent to call employers to a higher standard of accommodation. The purpose of the changes was not, to be sure, to require employers to bear greater burdens on behalf of religious employees. Rather, its purpose was to require them to be more scrupulous and creative in structuring nonburdensome accommodations.

A presumption that employees have been scrupulous in structuring accommodations hardly comports with the view of social norms that informed the design of the statute. Yet to make proof of the reasonableness of particular accommodations a part of the employee's *prima facie* case is to impose precisely such a presumption. It is, thus, clearly in keeping with the statutory scheme to impose the burden of proof upon the employer with respect to the viability of particular accommodations.

In the instant case, therefore, proof that Respondent was denied paid leave should be, as the Court of Appeals found, *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 483 (2d Cir. 1985), sufficient to establish a *prima facie* case of religious discrimination. It should not be necessary for Respondent to prove, as an aspect of his *prima facie* case, that the school could reasonably have provided him with paid leave. Rather, Petitioner school board should have the burden of showing why such an accommodation was not reasonable.

II

The Nature Of Title VII's Accommodation Requirement Is Best Understood Not Merely In Qualitative Terms, But In Terms Of A Spectrum Of Competing Primary Functions.

The logic of Title VII's prohibition of religious discrimination, considered in light of congressional intent, clearly requires Petitioner to accept any reasonable accommodation proposed by Respondent that would significantly minimize the burden upon Respondent's religion, so long

as that accommodation would not cause Petitioner undue hardship. As discussed above, Congress intended Title VII to impose an affirmative duty and not merely to serve a prohibitive function.

A. The Possible Functions Of Title VII Can Be
Elaborated Into Four Analytically Distinct
Versions Or Categorical Interpretations Of
The Statute, Which Make It Possible To Sort
Proposed Understandings Of The Accommoda-
tion Requirement Without Resorting To
Rough Qualitative Judgments.

The prohibitive-affirmative distinction, without more, imports a significant limitation on the range of meanings that otherwise could be assigned to the statute. Yet the source of this distinction furnishes a basis for additional and somewhat more precise distinctions that can be applied to narrow the range of legitimate meanings even further. The possible meanings of the statute are associated with an underlying spectrum of possible functions intended to be served by the statute, stretching from a purely prohibitive function on the one extreme, to a wholly affirmative commitment on the other. Neither extreme is, of course, what Congress intended.

The principal problem posed by the religious discrimination cases is thus typically thought to be one of making a qualitative judgment as to how far, within these extremes, an employer should be required to go in accommodating religious employees. In terms of the spectrum, this amounts to attempting to identify a point on the spectrum that corresponds to congressional intent. Framed in this way, the problem is virtually intractable, because what little legislative history exists is nowhere near detailed enough to afford a basis for such a precise discrimination. The tendency is, therefore, to suspend analysis in favor of raw judgment.

While it is not possible to make a precise qualitative judgment on the basis of the extant legislative materials,

neither is it necessary in the majority of cases, including the present one. It is possible, and at the same time sufficient, to identify more precisely the boundaries within which judgment may legitimately proceed. The typical approach mistakenly proceeds as if such cases posed the problem of locating a decisional point on a continuous spectrum. In fact, the spectrum is, when viewed at a reasonable level of abstraction, significantly discontinuous. Specifically, it breaks down naturally into four primary⁷ "bands,"⁸ or ranges of possibilities.

Each of these bands may be elaborated into a range of meanings, yet each provides a basis for grouping, and thus for excluding, certain possibilities and their associated meanings. The relevant or primary versions of the statutory function are: (1) purely prohibitive, (2) prohibitive

⁷The purely prohibitive and wholly affirmative versions of the statute define two natural extremes. The two other versions, which occupy the middle range of the spectrum, constitute first-level "blends" of these extremes, and in that sense are primary. It is possible to mix the affirmative and prohibitive dimensions differently, and thus to obtain other first-level blends, but the versions described here not only achieve a natural logical division, but also track the lines of divergence in the courts and are therefore particularly useful for evaluating the cogency of the arguments in each camp. *Compare, e.g., Pinsker v. Joint District No. 28J*, 735 F.2d 388 (10th Cir. 1984) (limited accommodation required) with *Philbrook v. Ansonia Board of Education*, 757 F.2d 476 (2d Cir. 1985).

⁸We use the term "bands" to evoke the metaphor of the color spectrum, which simply illustrates the dual nature of the spectrum of functions discussed here. Like the color spectrum, which is continuous and yet may be divided into bands of primary colors, so the spectrum of possible functions may be broken down into four primary alternatives which are discrete when viewed at one level of abstraction but continuous when viewed at another. The metaphor does not, however, exactly capture the concept under discussion, for the primary bands discussed here are not primary in the same sense that primary colors are. Primary colors are so denoted because they constitute pure forms of color from which all other colors are derived. The characterizations of functions are primary, not because they are pure, but because they are the first groupings to appear as one moves to a level of abstraction at which groupings can be perceived.

emphasis, (3) affirmative emphasis, and (4) wholly affirmative commitment. Elaborating the range of meanings suggested by each primary grouping clarifies that only version (3) comes close to approximating the congressional intent behind Title VII. Yet the school board's position is easily characterized as one that would fall within version (2). By contrast, Respondent's proposed accommodation fits comfortably within version (3). The following elaboration of these versions thus demonstrates why the decision of the court below must be affirmed.

B. The Four Competing Versions Of Title VII And Their Associated Ranges Of Meaning.

Version (1). *Purely Prohibitive*. A purely prohibitive measure would require employers only to avoid singling employees out on the basis of their religion for special negative treatment. For example, it would prevent an employer from denying an employee promotions on account of his religion. The focus of such a statute would be eliminating religious animus or prejudice. A world that was religion-blind would satisfy such a statute. Hence, a purely prohibitive measure would not require any special accommodation of religious employees, except to the extent that the failure to accommodate could be shown to be motivated by religious prejudice. There is, of course, no question that Congress intended to require more of employers than this, at least after 1972.

Version (2). *Prohibitive Emphasis*. A second major view of the statute would emphasize the prohibitive dimension just discussed, but would recognize a basic affirmative duty to make available some accommodations, if such accommodations could be achieved by the employer without incurring any more than *de minimis* costs. As a definitional matter, this version is distinguished from version (3) not so much by the degree of accommodation required, but by the degree of solicitude expected.

Specifically, it would not require the employer to ex-

haust the possible means of accommodation, or even thoroughly to explore them. It would require that at least *some* accommodation be provided, but it would stop (somewhat) short⁹ of requiring that *any* reasonable accommodation proposed by the employee be accepted. It would leave to the discretion of the employer, rather than to the employee, the decision as to how to accommodate the religious needs of the employee.

The logic of Congress's commitment not only to eradicating religious discrimination, but also to sustaining a modicum of religious pluralism, makes this category clearly underinclusive with respect to the duty to arrange accommodation for employees, though it is certainly much closer to the mark than version (1). This logic is best explicated in connection with the definition of version (3).

Version (3). *Affirmative Emphasis*. While version (2) contained an affirmative component, version (3) would emphasize an affirmative commitment to a modicum of religious pluralism. This version of the statute would obligate an employer to engage in any form of accommodation that would significantly minimize the burden on an employee's religious belief or practice, with the important limitation that no accommodation involving greater than *de minimis* costs would be required.¹⁰ This follows almost

⁹How short would be a matter of interpretation. It should be emphasized that the categorical approach does not deny the need for interpretation within categories or versions. Yet there is obviously tremendous value in being able to evaluate and distinguish whole classes of interpretations in terms of their compatibility with the purposes of the statute more broadly conceived.

¹⁰The *de minimis* limitation pertains only to the cost to the employer, not to the benefit received by the employee. It does not imply that an employer would be required to accommodate an employee only partially and not fully. See *Jordan v. North Carolina National Bank*, 565 F.2d 72 (4th Cir. 1977) (denying accommodation that would have given guarantee of Sabbath to employee). The issue in each case is whether a full accommodation, such as the guarantee in the *Jordan* case, would result in undue hardship on the employer. In some cases it obviously will, cf. *Kendall v. United Air Lines, Inc.*, 494

directly from the 1972 amendment to the definition of religion in Title VII which requires an employer to accommodate:

“all aspects of religious observance and practice . . . unless [the employer] demonstrates that he is unable to reasonably accommodate to an employee’s or prospective employee’s religious observance or practice without undue hardship on the conduct of the employer’s business.”

42 U.S.C. Section 2000e(j). The apparent purpose of the statute is to require employers to do whatever they can do, without substantial cost, to accommodate religious employees.

In distinguishing the various versions of the statute, we have thus far been implicitly dealing with the hypothetical case in which the possible forms of accommodation are equally burdensome (or nonburdensome) to the employer, from the standpoint of “real” costs. By real costs, we mean those costs which, if substantial enough, would amount to undue hardship, as opposed to other kinds of burdens which, though real enough to offend at least the aesthetic sensibilities of the employer, could never amount to undue hardship.¹¹

(footnote 10 continued)

F.Supp. 1380 (N.D. Ill. 1980) (full accommodation would have eroded seniority provisions of collective bargaining agreement); *Wren v. T.I.M.E. -D.C., Inc.*, 595 F.2d 441 (8th Cir. 1979), but in others it may not. See *Brown v. General Motors Corp.*, 601 F.2d 596 (8th Cir. 1979). The hardship on the employer may be a function of many factors, including the size of the business and the relative dependence upon the employee-claimant, cf. *Wren*, 595 F.2d at 444 (reduced work force made accommodation more difficult) with *Brown*, 601 F.2d at 961 (accommodation would affect four out of 1200-1600 employees), but is not affected by the perception that the employee is getting an unusually good deal.

¹¹It is unnecessary to attempt an explication of what particular things might count as “real” and what might be more properly classed

Yet given this hypothetical case, there would by definition be no “real” reason for the employer not to make available whatever form of accommodation minimized the burden on the employee’s religion. Indeed, the only reason not to accept an accommodation proposed by the employee, as an alternative to one proffered by the employer, would be the aesthetic sensibilities or mere discretion of the employer. It is hard to see why such a reason should count for much at all, but it is in any event clear that it could not count enough to justify a burden on the employee’s religion.

If there is a reason to justify an employer offering one and not another accommodation, it must be that the accommodations differ in terms of the real costs of each to the employer. Certainly, no one would begrudge an employer the right to choose, from among several accommodations resolving the conflict between the employee’s religion and his job, the one that involved the least cost. Yet if having made such an accommodation, the conflict is seen to recur or continue, albeit in a less severe form, the employee would in theory be entitled to bring a new claim under Title VII alleging a burden on his religion and demanding an accommodation. This process of claim and accommodation would then theoretically continue, until either the conflict were fully resolved or the employer could repel the demand with a counterclaim of undue hardship. Hence, the assertion of cost as the rationale for withholding one accommodation and proffering another will be either unnecessary or unavailing, unless it can be rehabilitated into a claim of undue hardship. It will be unnecessary if the lower cost accommodation resolves the conflict, but unavailing if it permits the generation of a new claim.

(footnote 11 continued)

as aesthetic, for though there might be disagreements of taxonomy on this point, it is important for present purposes only to sustain the concept of such a distinction. Obviously, certain kinds of costs, such as the fact that employees may grumble about an accommodation, are not statutorily relevant.

It might be argued that requiring employers to accommodate religious employees to this extent would violate the establishment clause. The short answer is that the undue hardship limitation prevents such accommodation from ever rising to the level of an establishment clause problem.¹² Indeed, undue hardship performs a function in the Title VII context similar to that performed by the compelling interest test in the free exercise clause context.¹³ The compelling interest test is one of the doctrinal safety valves which prevents the free exercise clause from overreaching its purposes and offending establishment clause values.¹⁴ The undue hardship limitation plainly distinguishes this version of the Title VII standard from the absolute accommodation requirement in *Thornton v. Caldor*, 105 S.Ct. 2914 (1985).

Moreover, to invert the argument and extend it one step further, the version of accommodation suggested here follows from the undue hardship limitation by virtue of

¹²Affirmative efforts to accommodate religion are not *per se* inconsistent with the establishment clause and may indeed be required by the free exercise clause in some contexts. See, e.g., *Widmar v. Vincent*, 454 U.S. 263 (1981); *Walz v. Tax Commission*, 397 U.S. 664, 673 (1970) (the "limits of permissible state accommodation are by no means co-extensive with the non-interference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself.") (Citations omitted); Note, *Establishment Clause, Secondary Religious Effects, and Humanistic Education*, 91 Yale L.J. 1196, 1201 n. 28 (1982) (discussing relationship between accommodation of religion and establishment clause).

¹³The compelling interest test was first formally announced as a free exercise clause test in *Sherbert v. Verner*, 374 U.S. 398 (1963). See also *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁴In fact, recognizing this connection, though we think misapplying it, the Third Circuit in *Williamsport Area School District v. Bender*, 741 F.2d 538, 562 (3rd Cir. 1984), held that the state's compelling interest in protecting establishment clause values was sufficient to override the free exercise claims presented there.

the same logic that makes the least restrictive means formulation a necessary corollary to the compelling interest test in the free exercise context. See Note, *Less Drastic Means and the First Amendment*, 78 Yale L.J. 464, 466-68 (1969). Thus, in the free exercise context, for the state to argue that a compelling interest requires a burden on religion is necessarily also to argue that the compelling interest cannot be achieved through some less burdensome means. Unwillingness to employ an alternative less burdensome means of achieving the compelling interest would demonstrate that the state's interest was actually in the means employed, and not in the interest asserted.

To characterize it in a way that most powerfully suggests the analogy, the compelling interest represents a cost that the state must avoid incurring. The least restrictive means requirement merely says that the state should accommodate religious interests whenever it can actually do so without incurring this cost. For the same reason, if an employer is unwilling to accept a proposed accommodation that is less burdensome to the employee but would not result in undue hardship, the employer's concern must be something other than cost. Indeed, such facts raise an inference of discriminatory intent. Yet while there may be other explanations, they would not be statutorily relevant, because the statutory limit is framed in terms of cost.

Thus, it may be seen that the standard imposed upon employers by the second version of the statute, which permits an employer to withhold some accommodations, apart from a defense of undue hardship, clearly falls short of the standard intended by Congress. It remains, then, only to consider whether the fourth version more closely approximates congressional intent than the third.

Version (4). *Wholly Affirmative Commitment*. This version of the statute would include any interpretation that viewed accommodation of religious interests as important enough to justify imposing upon employers greater than *de minimis* costs. The most extreme sub-version of this

category would view accommodation as an absolute requirement, regardless of cost. The statutorily mandated accommodation of Sabbatarians invalidated by this Court in *Thornton v. Caldor*, 105 S.Ct. 2914 (1985), would be an example of such an extreme sub-version. Although Congress contemplated that employers would incur some minimal cost in accommodating employees, Congress clearly did not envision a wholly affirmative commitment.

The third version of the statute is, therefore, the only one that corresponds to congressional intent. The first and second versions are too underinclusive with respect to the accommodation required, while the fourth just as clearly overreaches the congressional purpose and, at least in its most extreme sub-versions, runs afoul of the establishment clause.

C. Petitioner's Justification For Not
Accommodating Respondent's Religious
Practices Constitutes A Classic Statement
Of The Second Version Of The Statute And
Suggests An Understanding That Is
Structurally (Not Merely Qualitatively)
Distinct From The Version That
Corresponds To Congressional Intent.

The school board's argument in this case is quite clearly an argument for the second version of the statute. A part of their argument mistakenly assumes the only alternative to be the fourth version. In reality, there is, as it were, a middle road, which is the third version articulated above.

The school board argues that the three days of paid leave provided for religious observance, together with the allowance of additional days of unpaid leave for any additional religious observance, is a reasonable accommodation. See *Philbrook*, 757 F.2d at 484. Thus, the school board argues that it need not consider other, less burdensome means of accommodating Respondent's religious beliefs, for the reasonable accommodation it has proposed, while not the least burdensome, is sufficient to

satisfy the statute. In so doing, the school has advanced a classic statement of the second version of the statute. As we have seen, however, the only relevant question is whether the less burdensome accommodations would impose an undue hardship on the school. See also *Brener v. Diagnostic Center Hospital*, 671 F.2d 141 (5th Cir. 1982).

It is difficult to see how allowing Respondent to use leave allocated to the personal business category for religious observance would result in undue hardship. If the school is willing to allow him three days to attend charity meetings, to work on personal financial matters, or even perhaps to go fishing, it is hard to understand how they can invoke undue hardship in response to a proposal that he use the three days for religious observance instead. Indeed, they could not reasonably make such an argument, and thus, are forced to seek shelter within the umbrage of a version of the statute that does not obligate them to make such accommodations available in the first place.

It is perhaps a closer question whether the employment of a substitute teacher results in undue hardship. Yet this should not be relevant either, for the school is apparently willing to allow him to employ a substitute during his unpaid leave. They are balking, then, not at employment of the substitute, but at paying him his full salary, and allowing him to bear the burden of the additional cost of hiring a substitute. Paying him full salary merely continues the status quo. There thus does not appear to be any basis for an undue hardship claim here. The real issue in this case is not, therefore, undue hardship but whether the statute obligates employers to do more than propose a reasonable accommodation. Because it plainly does, the decision of the court below must be affirmed.

Respectfully submitted,

F. Tayton Dencer
John W. Whitehead
Counsel of Record

Larry L. Crain
The Rutherford Institute
P.O. Box 510
Manassas, Virginia 22110
(703) 369-0100

Attorneys for *Amici Curiae*

Thomas O. Koutoc
The Rutherford Institute of
Alabama
317 North Hull Street
Montgomery, Alabama 36104

Joseph Secola
The Rutherford Institute of
Connecticut
31 Daggett Street
Milford, Connecticut 06460

Alfred Lindh
The Rutherford Institute of
Delaware
1 Customs House Square
Wilmington, Delaware 19801

William B. Hollberg
Wendell R. Bird
The Rutherford Institute of
Georgia
1275 Peachtree St., N.E.
Atlanta, Georgia 30309

John K. Webb
The Rutherford Institute of
Kentucky
8 Ardery Place, Suite 4
Paris, Kentucky 40361

David A. French
The Rutherford Institute of
Michigan
2010 Devolson
Ann Arbor, Michigan 48104

Tony P. Trimble
The Rutherford Institute of
Minnesota
316 East Main
Anoka, Minnesota 55305

J. Douglas Alexander
The Rutherford Institute of
Montana
104 Second Avenue, S.W.
Sidney, Montana 59270

Les Bailey
The Rutherford Institute of
Tennessee
710 East Sullivan Street
Kingsport, Tennessee 37660

W. Charles Bundren
The Rutherford Institute of
Texas
P.O. Box 923
Dallas, Texas 75221

Guy O. Farley, Jr.
The Rutherford Institute of
Virginia
10521 Judicial Place
Fairfax, Virginia 22030

MOTION FILED
JUN 27 1986

No. 85-495

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

ANSONIA SCHOOL BOARD, *ET AL*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Writ Of Certiorari From
The United States Court Of Appeals
Second Circuit

**MOTION OF THE GENERAL CONFERENCE
OF SEVENTH-DAY ADVENTISTS
FOR LEAVE TO FILE *AMICUS CURIAE*
BRIEF AND BRIEF AS *AMICUS CURIAE*
IN SUPPORT OF PHILBROOK**

WALTER E. CARSON, Esq.
ALAN REINACH
JOHNS AND CARSON
Office of General Counsel
GENERAL CONFERENCE OF
SEVENTH-DAY ADVENTISTS
6840 Eastern Ave., N.W.
Washington, D.C. 20012
(202) 722-6320

**IN THE
SUPREME COURT OF THE UNITED STATES**

October Term, 1985

No. 85-495

ANSONIA BOARD OF EDUCATION, *ET AL*,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

**MOTION OF THE GENERAL CONFERENCE OF
SEVENTH-DAY ADVENTISTS FOR LEAVE
TO FILE BRIEF AS *AMICUS CURIAE***

The General Conference of Seventh-day Adventists respectfully moves this Court for leave to file the accompanying brief as *amicus curiae*. Counsel of Record for Petitioner has consented to the filing of such a brief. Counsel for the Respondent School Board, however, declined to do so.

INTEREST OF APPLICANT

The Seventh-day Adventist Church is a worldwide religious denomination whose four and a half million members follow the Biblical command that the Sabbath, the seventh day of the week, be set aside from secular work and other wordly endeavors.

Because of their Sabbatarian beliefs and practices, Seventh-day Adventists often encounter scheduling difficulties in the workplace. In one four-year period, the Church's Department of Public Affairs and Religious Liberty recorded more than 800 employment problems involving Sabbath observance in the United States, where some 600,000 Adventists reside. *Hearings Before the United States Equal Employment Opportunity Commission on Religious Accommodation* 30 (1980). Following this Court's decision in *Trans World Airlines, Inc., v. Hardison*, 432 U.S. 63 (1977), the number of such problems "has ballooned." *Hearings* at 30.

Since *Hardison*, the vitality of the religious accommodation provisions of Title VII has been uncertain. Some commentators have theorized that these provisions are a violation of the First Amendment's Establishment Clause.¹ Employers have often relied upon the *de minimus* standard articulated in *Hardison* as an excuse for their refusal to accommodate employees' religious beliefs and practices thus making it more difficult for employees to negotiate reasonable religious accommodations. Indeed, one Circuit Court determined that employers are under virtually no obligation to attempt any accommodation at all. *Turpen v. Missouri-Kansas-Texas Railroad Co.*, 736 F.2d 1022 (5th Cir. 1984).

Understandably, the Seventh-day Adventist Church and its members have a significant interest in urging this Court to: (1) affirm the constitutionality of the religious

¹E.g., Garvey, *Freedom and Equality in the Religion Clauses*, 1981 Sup. Ct. Rev. 193, (1981); Eades, *Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion*, 5 U. Dayton L.R. 59 (1980); Note, *Is Title VII's Reasonable Accommodations Requirement a Law "Respecting an Establishment of Religion"?*, 51 N.Dame Law 482 (1976).

accommodation provision of Title VII; and (2) carefully define the appropriate time at which the defense of undue hardship can be raised. Absent such an opinion the protections provided in Title VII for religious minorities are without meaning.

Its *Amicus Curiae* brief would argue three points: (1) an employer must attempt an accommodation before it is entitled to raise the defense of undue hardship; (2) the Free Exercise Clause requires the state, as employer, to accommodate the religious needs of its employees, apart from Title VII of the Civil Rights Act of 1964; and (3) that the religion clauses of the First Amendment be read together as protecting religious liberty; and thus, the religious accommodation provision of Title VII is a constitutionally permissible protection of employees' religious freedom.

The Adventist Church is deeply concerned with the consequences that the Court's decision may have on religious accommodation in employment. It will certainly affect individual employees throughout the country, and will either impress employers with the seriousness of their legal duty, or alternatively, may be used as an excuse to avoid any responsibility under Title VII. The Court's decision will also affect the religious accommodation provisions of other federal laws. For example, the Court's decision could bring into question the constitutionality of such diverse religious exemption or accommodation provisions as the exemption for ministers in the Selective Service Act, 40 U.S.C.A. § 456(g); the exemption for employees who have religious objections to paying dues and fees to labor organizations, 29 U.S.C.A. § 169; and the exemption for self-employed individuals who have religious objections to paying Social Security taxes, 26 U.S.C.A. § 1402(g).

Because of the interest in preserving the First Amendment rights of its members and others who because of sincerely held religious convictions are unable to work on their holy days, the Seventh-day Adventist Church requests that its motion for leave to file an *amicus curiae* brief in support of Petitioner Philbrook be granted.

Respectfully submitted,

WALTER E. CARSON, ESQ.

ALAN REINACH

JOHNS AND CARSON

Office of General Counsel

General Conference of

Seventh-day Adventists

6840 Eastern Ave., N.W.

Washington, D. C. 20012

(202) 722-6320

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE BRIEF <i>AMICUS CURIAE</i> .	i
INTEREST OF APPLICANT	ii
TABLE OF AUTHORITIES.....	vii
BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS <i>AMICUS CURIAE</i> IN SUPPORT OF PHILBROOK	1
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF ARGUMENT.....	1
ARGUMENT	2
I. THE EMPLOYER MUST FIRST SHOW AN ACTUAL ATTEMPT AT A REASONABLE ACCOMMODATION BEFORE IT CAN RAISE THE DEFENSE OF UNDUE HARDSHIP	2
II. THE FREE EXERCISE CLAUSE REQUIRES THE STATE, AS EMPLOYER, TO ACCOMMODATE THE RELIGIOUS PRACTICES OF ITS EMPLOYEES, APART FROM ANY REQUIREMENT UNDER TITLE VII ..	5
III. THE <i>DE MINIMUS</i> LANGUAGE ADOPTED IN <i>HARDISON</i> HAS UNINTENTIONALLY UNDERMINED THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII. SINCE THE ESTABLISHMENT CLAUSE PERMITS RELIGIOUS ACCOMMODATION AND IS NOT OFFENDED BY TITLE VII, THE COURT SHOULD CLARIFY AND REAFFIRM THE CONSTITUTIONAL VALIDITY OF THE REASONABLE ACCOMMODATION STANDARD	10
A. Both Religion Clauses Promote Religious Freedom And Permit Religious Accommodation ..	12
B. The Religious Accommodation Provision Of Title VII Has The Secular Purpose And Effect Of Preventing Discrimination In Employment	14
1. § 701(j) Has A Secular Purpose	14
2. § 701(j) Has A Non-Discriminatory Secular Effect	17
C. The Establishment Clause Is In Harmony With The Protection Of Religious Liberty Afforded By The Free Exercise Clause	22
CONCLUSION.....	25

TABLE OF AUTHORITIES

Page

CASES:

<i>Abington School District v. Schempp</i> , 374 U.S. 203 (1963).....	12, 15, 18, 19, 23, 24
<i>Anderson v. General Dynamics Convair Aerospace Division</i> , 589 F.2d 397 (9th Cir. 1978)	31
<i>Board of Education v. Allen</i> , 392 U.S. 236 (1968).....	15
<i>Bowen v. Roy</i> , 54 U.S.L.W. 4603 (1986).....	20
<i>Burns v. Southern Pacific Transportation Co.</i> , 589 F.2d 403 (9th Cir. 1978)	3
<i>Claybaugh v. Pacific Northwest Bell Telephone Co.</i> , 355 F.Supp. 1 (D.Or. 1973).....	3
<i>Committee for Public Education and Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973)	23
<i>Connick v. Myers</i> , 461 U.S. 138 (1983)	9
<i>Cummins v. Parker Seal Co.</i> , 516 F.2d 544 (6th Cir. 1975).....	15, 16, 17
<i>Engel v. Vitale</i> , 370 U.S. 421 (1962).....	12, 15
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968)	15
<i>Everson v. Board of Education</i> , 330 U.S. 1 (1947)	15
<i>Gillette v. United States</i> , 401 U.S. 437 (1971).....	12, 13
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971).....	14, 22
<i>Lynch v. Donnelly</i> , 104 S.Ct. 1355 (1984).....	15, 24
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983).....	15, 18
<i>McDaniel v. Essex International Inc.</i> , 509 F. Supp. 1055 (W.D. Mich. 1981).....	4
<i>McDaniel v. Essex International Inc.</i> , 571 F.2d 338 (6th Cir. 1978)	4, 11
<i>McGowan v. Maryland</i> , 366 U.S. 420 (1961).....	14, 15
<i>Mueller v. Allen</i> , 466 U.S. 388 (1983)	22
<i>Nottleson v. Smith Steel Workers D.A.L.U.</i> 19806, 643 F.2d 445 (7th Cir.) (1981).....	11
<i>Philbrook v. Ansonia Board of Education</i> , 757 F.2d 476 (2d Cir. 1985).....	5, 21
<i>Pickering v. Board of Education</i> , 391 U.S. 563 (1968) ..	8
<i>Riley v. Bendix</i> , 330 F.Supp. 583 (M.D.Fla. 1971).....	5
<i>Rohr v. Western Electric Co.</i> , 567 F.2d 829 (8th Cir. 1979)	11
<i>School District of Grand Rapids, Michigan v. Ball</i> , 105 S.Ct. 3216 (1984)	23

Table of Authorities Continued

Page

<i>Selective Draft Law Cases</i> , 245 U.S. 366 (1918).....	13
<i>Shelton v. Tucker</i> , 364 U.S. 479 (1960)	6, 8
<i>Sherbert v. Verner</i> , 374 U.S. 398 (1963).....	7, 18, 20
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	6
<i>Stone v. Graham</i> , 449 U.S. 39 (1980).....	4, 15, 24
<i>Thomas v. Review Board</i> , 450 U.S. 707 (1981).....	6, 7, 14
<i>Thornton v. Caldor</i> , 105 S.Ct. 2914 (1985).....	7, 12
<i>Tilton v. Richardson</i> , 403 U.S. 672 (1971).....	15
<i>Tooley v. Martin—Marietta</i> , 648 F.2d 1239 (1981).....	16
<i>Trans World Airlines v. Hardison</i> , 432 U.S. 63, (1977).....	passim
<i>Turpen v. Missouri-Kansas-Texas Railroad</i> , 736 F.2d 1022 (5th Cir. 1984).....	ii, 11
<i>United States v. Lee</i> , 455 U.S. 252 (1982)	13
<i>United States v. Seeger</i> , 380 U.S. 163 (1965).....	8
<i>Wallace v. Jaffree</i> , 104 S.Ct. 2479 (1985).....	12, 16
<i>Walz v. Tax Commission</i> , 397 U.S. 664 (1970)....	12, 14, 20
<i>Welsh v. United States</i> , 398 U.S. 333 (1970).....	13, 18
<i>West Virginia State Board of Education v. Barnette</i> , 319 U.S. 624 (1943)	7, 18
<i>Wisconsin v. Yoder</i> , 406 U.S. 205 (1972).....	7, 13, 18
<i>Witters v. Washington Department of Services for the Blind</i> , 106 S.Ct. 748 (1986).....	16
<i>Yott v. North American Rockwell Corp.</i> , 602 F.2d 904 (9th Cir. 1979)	11
<i>Zorach v. Clauson</i> , 343 U.S. 306 (1952).....	18, 19, 22

CONSTITUTIONAL PROVISIONS:

United States Constitution:

Amendment I	passim
Amendment XIV.....	passim

STATUTES:

Title VII, Civil Rights Act of 1964, as amended

§ 42 U.S.C. 2000e, et seq.	passim
§ 701(j).....	passim

Table of Authorities Continued

Page

OTHER AUTHORITIES:

Eades, <i>Title VII of the Civil Rights Act of 1964—An Unconstitutional Attempt to Establish Religion</i> , 5 U. Dayton L.R. 59 (1980).....	ii
Hearings Before the United States Equal Employment Opportunity Commission on Religious Accommodation (1980)	ii
Garvey, <i>Freedom and Equality in the Religion Clauses</i> , 1981 Sup. Ct. Rev. 193 (1981).....	ii
Note, <i>Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison</i> , 53 Fordham L.R. 839 (1985).....	11
Note, <i>Is Title VII's Reasonable Accommodations Requirement a Law "Respecting an Establishment of Religion"?</i> 51 N. Dame Law 482 (1976)	ii
Stone, <i>The Conscientious Objector</i> , 21 Col. U. Q. 253 (1919)	8
Tribe, <i>American Constitutional Law</i> (1978).....	17
118 Congressional Record 705	16

IN THE
Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-495

ANSONIA SCHOOL BOARD, et al,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Appeal From The United States
 Court of Appeals For The Second Circuit

**BRIEF OF THE GENERAL CONFERENCE OF
 SEVENTH-DAY ADVENTISTS, AMICUS CURIAE,
 IN SUPPORT OF RESPONDENT**

INTEREST OF AMICUS CURIAE

The interest of the Seventh-day Adventist Church as *amicus curiae* has been detailed in the Church's Motion for Leave to File *Amicus Curiae* Brief, which is attached to this brief and incorporated here by reference.

SUMMARY OF ARGUMENT

The religious accommodation provision of Title VII of the Civil Rights Act of 1964 requires employers to take active steps to accommodate the religious practices of

their employees. In the absence of such active attempts, the employer is guilty of discrimination and is not entitled to raise the defense of undue hardship. Since the school steadfastly refused to even attempt to work out an accommodation with Respondent Philbrook, the school board cannot rely upon the defense of undue hardship.

Apart from the requirements of Title VII, the Free Exercise Clause also protects state employees from religious discrimination in employment. Under a balancing of interests test, the school board cannot show that its interest in providing education would be undermined by paying Philbrook for his religious leave. Furthermore, since other employees are entitled to paid leave for secular purposes, to fail to pay Philbrook for his valid religious leave constitutes both religious discrimination and a denial of equal protection.

Finally, the *de minimus* language used by the Court in *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), has been misunderstood as establishing a new standard of accommodation that, in effect, does not really require the employer to accommodate the religious practices of its employees. Since § 701(j) is fully consistent with both Religion Clauses of the First Amendment, the reasonable accommodation standard needs to be reaffirmed by the Court so that employers will understand that they do, indeed, have a duty to accommodate.

ARGUMENT

I. THE EMPLOYER MUST FIRST SHOW AN ACTUAL ATTEMPT AT A REASONABLE ACCOMMODATION BEFORE IT CAN RAISE THE DEFENSE OF UNDUE HARDSHIP.

If left to themselves, employers are frequently unwilling to be bothered with the religious needs of individual employees. Thus, § 701(j) of Title VII was enacted to require employers to actively accommodate the religious

practices of its employees. If the goal of Title VII in eliminating religious discrimination is to be achieved, employers need a clear message of their obligations under this law. Absent affirmative efforts at accommodation, employers must not be permitted to raise the defense of undue hardship on the operation of their business.

Several courts have interpreted § 701(j) as requiring just such affirmative efforts to accommodate before an employer can raise the defense of undue hardship. Thus, "an employer cannot sustain its burden of showing undue hardship without first showing that it made an accommodation as an attempted remedy." *Claybaugh v. Pacific Northwest Bell Telephone Co.*, 355 F.Supp. 1, 6 (D.Or.1973). This standard was adopted by the Ninth Circuit Court of Appeals in a pair of cases involving religious objection to the payment of union dues. *Anderson v. General Dynamics*, 589 F.2d 397 (9th Cir. 1978); *Burns v. Southern Pacific Transportation Co.*, 589 F.2d 403 (9th Cir. 1978). In both cases, the union refused to accept as a religious accommodation payment by the employees of an amount equivalent to the union dues to a charity. In *Burns*, the court said: "the employer is required to take some steps in negotiating with the employee to reach a reasonable accommodation to the particular religious beliefs at issue." *Id.* at 406. Thus, the employer was required to make "more than a negligible effort to accommodate the employee" and only after such attempts prove "inadequate" may the employer plead undue hardship. *Id.*

In *Anderson*, the court said: "[t]he burden was upon the [company], not Anderson, to undertake initial steps toward accommodation. They cannot excuse their failure to accommodate by pointing to deficiencies, if any there were, in Anderson's suggested accommodation." *Id.* at 401 (emphasis added). Further, once the plaintiff establishes a *prima facie* case, the burden then shifts to the

employer "to prove that they made good faith efforts to accommodate" the employee's religious beliefs. *Id.* The court's refusal to permit the company to raise the undue hardship defense was based in part upon its "skepticism concerning 'hypothetical hardships' based on assumptions about accommodations which have never been put into practice." *Id.*, (citation omitted).

The Sixth Circuit adopted a similar standard in *McDaniel v. Essex*, 571 F.2d 338 (6th Cir. 1978). The court stated that "none of our opinions may be read as excusing an employer from making any effort to accommodate the religious beliefs of an employee." *Id.* at 342. Thus, the court placed the burden on the employer "to make an effort at accommodation and, if unsuccessful, to demonstrate that they were unable to reasonably accommodate the plaintiff's religious beliefs without undue hardship." *Id.* On remand in *McDaniel*, the District Court declared:

Nevertheless, it is the opinion of this court that proof of an effort by the defendant to accommodate the religious practices of an employee is required before that defendant can be allowed to raise the further defense of undue hardship.

McDaniel v. Essex, 509 F. Supp. 1055, 1058 (W.D.Mich.1981).

An employer that refuses to make any effort to accommodate the religious practices of an employee must not be permitted to plead as a part of its undue hardship defense: "there was nothing we could do." In the instant case, the school board passively permitted Philbrook to take religious leave days without pay for several years. When, unable to take leave without pay any longer, Philbrook sought an accommodation, the school board did absolutely nothing. Its passive acceptance of Philbrook's prior unpaid absences did not constitute an affirmative effort at accommodation. The relevant time period began when Philbrook first sought an accommodation. From the time

Philbrook began to suggest to the school authorities various ways to accommodate his religious needs, the Board consistently rejected or ignored his proposals. *Philbrook v. Ansonia School Board*, 757 F.2d 476, 480 (2d Cir. 1985). To permit the board to raise the undue hardship defense would encourage discrimination in blatant disregard for the spirit and letter of the law.

In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Supreme Court stated that § 701(j) was added to change the result of *Riley v. Bendix*, 330 F.Supp. 583 (M.D.Fla.1971), in which "the employer had not made any effort whatsoever to accommodate the employee's religious needs." *Hardison*, 432 U.S. at 75 n.9. Thus, Title VII requires the employer to affirmatively accommodate the religious practices of its employees. When the employer fails to take action to attempt an accommodation, it is guilty of discrimination and is without a defense.

If the purpose of Title VII in eliminating religious discrimination in employment is to be realized, it is essential that employers be required to actively accommodate an employee's religious needs before being permitted to raise the defense of undue hardship. Otherwise, an employer will assert, after the fact, that anything it might have done would have been unduly burdensome without ever having made an attempt at accommodation. Such a construction encourages employers not to make any effort to accommodate, and to excuse such inaction by the mere assertion of an "undue hardship." If acceptable, this attitude would defeat the whole purpose of Title VII. Under this law, employers must be required to actively pursue religious accommodation, or else forfeit the right to raise the defense of undue hardship.

II. THE FREE EXERCISE CLAUSE REQUIRES THE STATE, AS EMPLOYER, TO ACCOMMODATE THE RELIGIOUS PRACTICES OF ITS EMPLOYEES, APART FROM THE REQUIREMENTS OF TITLE VII.

By application of the Free Exercise Clause of the First Amendment to the states through the Fourteenth Amendment, the state has a duty to protect the rights of its employees to freely practice their religion. This duty arises wholly apart from any statutory requirement contained in Title VII of the Civil Rights Act of 1964. Even though an employee has no "right" to employment in the public sector, the state must not condition that employment on the giving up of fundamental rights. *Speiser v. Randall*, 357 U.S. 513 (1958). It is not simply employment that the state may not deny the employee. Government "may not deny a benefit, to a person on a basis that infringes his constitutionally protected interests." *Id.*, at 526 (emphasis added). Such a denial of benefits is offensive because it puts coercive pressure upon the employee. *Shelton v. Tucker*, 364 U.S. 479, 486 (1960). The Supreme Court has recently declared:

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement may be substantial.

Thomas v. Review Board, 450 U.S. 707, 717-718 (1981) (emphasis added).

Under Title VII the private employer is under no constitutional obligation to accommodate, as the duty is purely statutory. The fact that the statute enacted under Congressional commerce power upholds the spirit of the Constitution to protect fundamental rights is irrelevant,

for the Constitution creates no right to be free from discrimination in private employment. This does not minimize the importance of non-discrimination in employment. It simply helps explain why the interests of the employer in maintaining the integrity of business functions must be given significant weight in the balancing against religious interests under Title VII. Thus, in *Thornton v. Caldor*, 105 S.Ct. 2914 (1985), the Supreme Court invalidated a Connecticut law that entitled employees to take off on their sabbaths, regardless of any hardship that might be caused to the business or to other employees. *Id.* at 2917.

The state as employer, however, falls into a different category. Although the state has a significant interest in maintaining the integrity of its public enterprises, "[u]nder the Religion Clauses, Government must guard against activity that impinges on religious freedom." *Caldor*, 105 S.Ct. at 2917. Just as state action denying unemployment benefits to employees fired because of conflicts arising out of their religious practices and beliefs constitutes a denial of Free Exercise rights, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Thomas*, 450 U.S. 717; so too does state refusal to accommodate the religious beliefs of its employees place an unacceptable burden on the Free Exercise of religion. Thus, the state has a duty to reasonably accommodate the religious beliefs of its employees independent of the requirements of Title VII.

The contract between Ansonia School Board and the union constitutes state action that has coerced Philbrook into compromising his religious integrity. Philbrook violated his conscience because the receipt of salary was conditioned on his working on some of his religious holidays. The fact that the contract was neutral on its face is not controlling. The Court has frequently found facially neutral statutes to infringe upon individual liberties. *West Virginia State Board of Education v. Barnette*, 319 U.S.

624 (1943); *Sherbert*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Thomas*, 450 U.S. 717 (1981). Such violation cannot be treated lightly. Harlan Fiske Stone, later Chief Justice declared that:

[A]ll our history gives confirmation to the view that liberty of conscience has a moral and social value which makes it worthy of preservation at the hands of the state. So deep is its significance and vital indeed is it to the integrity of men's moral and spiritual nature that nothing short of the self-preservation of the state should warrant its violation . . . Stone, *The Conscientious Objector*, 21 Col U.Q. 253, 269 (1919),

quoted in, *United States v. Seeger*, 380 U.S. 163, 856 (1965).

The violation of fundamental liberties is of special concern when it occurs in the context of our schools.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. By limiting the power of the States to interfere with freedom of speech and freedom of inquiry and freedom of association, the Fourteenth Amendment protects all persons, no matter what their calling. But, in view of the nature of the teacher's relation to the effective exercise of the rights which are safeguarded by the Bill of Rights and by the Fourteenth Amendment, inhibition of freedom of thought, and of action upon thought, in the case of teachers brings the safeguards of those amendments vividly into operation.

Shelton v. Tucker, 364 U.S. 487 (1960).

If it is undesirable to hinder the free expression of teachers because of their special relationship to the education of America's youth, it should be similarly offensive to hinder their religious freedom. Denial of teachers' religious freedom presents students with a direct and personal example of national hypocrisy. If students are to learn the value of freedom, that value must be both taught

and practiced in the classroom. To coerce Philbrook into teaching his classes on those days when his conscience demands that he engage in worship undermines the dissemination of the liberty of conscience Americans so cherish. Religious freedom must always receive "vigilant protection", *Id.*, but especially in public schools.

In cases involving free speech, the Supreme Court has applied a balancing test to resolve the conflicting interests of the public employer and the employee. *Connick v. Myers*, 461 U.S. 138, 143 (1983); *Pickering v. Board of Education*, 391 U.S. 563 (1968).

The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Pickering, 391 U.S. at 568.

Similarly, under the Free Exercise Clause, a balance should be struck between the religious needs of the teacher and the integrity of the school's functioning. Since Philbrook was permitted to take time off for religious leave in any event, his absence cannot constitute a burden on the school. The sole issue is whether paid leave would unduly hamper the school board in the administration of education. Unlike *Hardison*, 432 U.S. 63, where a valid union seniority system prevented the airline from reasonably accommodating a maintenance mechanic, the rights or interests of other employees are not affected by requiring the school board to pay for Philbrook's religious leave. Even though an exception to an otherwise valid and neutral union contract provision is required, this case is readily distinguishable from cases, such as *Hardison*, 432 U.S. 63, where a hardship would be forced upon other employees. Furthermore, since other employees are not

required to pay the salaries of their substitutes when taking valid personal leave, neither should Philbrook be required to pay for his substitute. This would discriminate against Philbrook on the basis of his religion, as well as deny him the equal protection of the law under the Fourteenth Amendment.

When Philbrook's constitutionally protected religious interest is weighed against the insignificant cost to the school of accommodating him, the Board's constitutional duty to accommodate Philbrook's religious exercise becomes clear. The Board's refusal to accommodate coerced Philbrook into compromising his religious beliefs by working on his holidays. Such coercion is impermissible, and must be removed. Since other employees are entitled to paid leave time for legitimate personal reasons, Philbrook should also be entitled to paid leave for his legitimate religious reasons.

III. THE *DE MINIMUS* LANGUAGE ADOPTED IN *HARDISON* HAS UNINTENTIONALLY UNDERMINED THE RELIGIOUS ACCOMMODATION PROVISION OF TITLE VII. SINCE THE ESTABLISHMENT CLAUSE PERMITS RELIGIOUS ACCOMMODATION AND IS NOT OFFENDED BY TITLE VII, THE COURT SHOULD CLARIFY AND REAFFIRM THE CONSTITUTIONAL VALIDITY OF THE REASONABLE ACCOMMODATION STANDARD.

The Establishment Clause does not prevent Congress from requiring accommodation of an employee's religious practices. One issue in this case is whether it is constitutionally permissible to prevent an employer from firing someone because he is Catholic, for example, but impermissible to insist that the employer take reasonable steps to retain a Sabbath-keeping Orthodox Jew. If so, then constitutional protection against religious discrimination in employment protects only those whose religion does

not conflict with employment conditions, namely, the majority. If the employer is under no affirmative duty to accommodate, members of religious minorities become subject to blatant discrimination.

In *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), the Supreme Court did not focus on the scope of the "reasonable accommodation" standard enacted by Congress in § 701(j) of Title VII of the Civil Rights Act of 1964. Instead, the Court used another basis for analysis: the *de minimus* standard. Regrettably, this action has had the unintended effect of weakening the "reasonable accommodation" standard. As a consequence, a body of law has developed which has either ignored the Court's *de minimus* rationale, e.g., *McDaniel v. Essex International, Inc.*, 696 F.2d 34 (6th Cir. 1982); *Nottleson v. Smith Steel Workers D.A.L.U.* 19806, 643 F.2d 445 (7th Cir. 1981); See also, Note, *Heaven Can Wait: Judicial Interpretation of Title VII's Religious Accommodation Requirement Since Trans World Airlines v. Hardison*, 53 Fordham L.R. 839, 847 (1985) (hereinafter cited as *Fordham Note*) ("several courts have in fact given only superficial obeisance to the Supreme Court's 'more than de minimus cost' hardship doctrine, while actually creating more demanding standards for defendants."); or has interpreted the *de minimus* language to mean that employers cannot be required to accommodate the religious practices of their employees. e.g. *Turpen v. Missouri-Kansas-Texas Railroad*, 736 F.2d 1022 (5th Cir. 1984); *Yott v. North American Rockwell corp.*, 602 F.2d 904 (9th Cir. 1979); *Rohr v. Western Electric Co.*, 567 F.2d 829 (8th Cir. 1979); See also, *Fordham Note*, at 855 n.128 ("By making the standard of 'undue hardship' extremely easy to meet, a court in effect negates the duty to accommodate"). Thus, in *Turpen*, 736 F.2d 1022, a railroad employer was found to be unduly burdened by an hour and a half attempt to adjust an employee's work schedule.

Similarly, in *Rohr*, 567 F.2d 829, the court held that any accommodation alternatives were unduly burdensome to a large corporation. As an apparent consequence of *Hardison*, Title VII's goal of eliminating religious discrimination in employment has been seriously impeded.

Certainly, the Court never intended to substitute its *de minimus* language for the "reasonable accommodation" standard enacted by Congress. *Hardison* has created unintended confusion, therefore, allowing some to argue that § 701(j) is an unconstitutional establishment of religion. The Church contends that § 701(j) is a permissible accommodation under both religion clauses, and respectfully petitions this Court to so hold, thus affirming the great principle of religious liberty, while clarifying the conflicting results which have flowed from *Hardison*.

A. Both Religion Clauses, Promote Religious Freedom And Permit Religious Accommodation

Although the Court has occasionally suggested that the two religion clauses are in conflict, *E.g.*, *Walz v. Tax Commission*, 397 U.S. 664, 668-669, (1970), it has repeatedly recognized the existence of "a general harmony of purpose between the two religion clauses of the First Amendment." *Gillette v. United States*, 401 U.S. 437, 461 (1971). "The ultimate First Amendment objective," Justice Goldberg declared, is "religious liberty." *Abington School District v. Schempp*, 374 U.S. 203, 306 (1963) (Goldberg, J. concurring) "The Framers did not entrust the liberty of religious beliefs to either clause alone." *Schempp*, 374 U.S. at 256 (Brennan, J. concurring). Thus, the Establishment Clause is a "coguarantor, with the Free Exercise Clause, of religious liberty." *Id.* More recently, the Court declared that "under the Religion Clauses, Government must guard against activity that impinges on religious freedom." *Thornton v. Caldor*, 105 S.Ct. 2914, 2917 (1985). Thus, "although a distinct juris-

prudence has enveloped each of these clauses, *their common purpose is to secure religious liberty*. See *Engel v. Vitale*, 370 U.S. 421, 430 (1962)" cited in, *Wallace v. Jaffree*, 104 S.Ct. 2479, 2496 (1985) (O'Connor, J. concurring). (emphasis added).

Statutory accommodations of religious practices are in the best tradition of the First Amendment and are just as consistent with the Establishment Clause as they are with Free Exercise. Writing in *Schempp*, Justice Brennan perceptively noted:

Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society. Likewise *nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs*. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.

74 U.S. 203 at 295. (emphasis added).

Similarly, in *Gillette*, Justice Marshall stated:

Quite apart from the question whether the Free Exercise Clause might require some sort of exemption, *it is hardly impermissible for Congress to attempt to accommodate free exercise values*, in line with "our happy tradition" of "avoiding unnecessary clashes with the dictates of conscience." *United States v. Macintosh*, 283 U.S. at 634 (Hughes, C.J., dissenting).

401 U.S. at 453 (emphasis added).

Because the two religion clauses are essentially in harmony they should not readily be interpreted to conflict. The Court should consider the underlying purpose of both clauses which is to protect and promote religious liberty, as it has consistently done. The court has consistently recognized the constitutional validity of exemptions or accommodations for conscientious objection, *Welsh v. United States*, 398 U.S. 333 (1970); *Selective Draft Law Cases*, 245 U.S. 366 (1918); for the Amish, *United States v. Lee*, 455 U.S. 252 (1982) (approving exemption from social security tax for self-employed but not for employees); for American Indians, *Bowen v. Roy*, 54 U.S.L.W. 4603 (1986) (approving statutory protection for American Indian religious freedom); and for tax exemption for churches, *Walz v. Tax Commission*, 397 U.S. 664 (1970). It has judicially created similar exemptions as well, *e.g.* *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (exempting Amish children from compulsory attendance at high school); *Thomas v. Review Board*, 450 U.S. 707 (1981) (exempting employees discharged for religious reasons from disqualification from unemployment benefits). It is too late in the day to doubt that such exemptions are permissible expressions of the constitutional commitment to religious freedom expressed in both religion clauses of the First Amendment. If § 701(j) is to be singled out for invalidation by the Establishment Clause, it must be shown to be significantly more offensive than the exemptions and accommodations illustrated here.

B. The Religious Accommodation Provision Of Title VII Has A Secular Purpose And Effect To Prevent Religious Discrimination In Employment.

Those courts and commentators that would hold § 701(j) to be an unconstitutional establishment of religion rely primarily on two points: its supposed religious purpose expressed by Senator Randolph, the bill's sponsor; and the statute's alleged discriminatory effect.

1. § 701(j) Has A Secular Purpose

The remarks of Senator Randolph are supposed to betray the religious purpose of § 701(j), thereby violating the first prong of the three part *Lemon* test (requiring all legislation to have a secular purpose, a secular effect, and to not cause excessive entanglement between church and state), 403 U.S. 602 (1971). Ever since *McGowan v. Maryland*, 366 U.S. 420 (1961), the Court has held that legislation must have a secular purpose if it is to pass muster under the Establishment Clause. The secular purpose standard, described in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984), allows for some religious purpose as well:

The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, *but only when* it has concluded there was no question that *the statute or activity was motivated wholly by religious considerations*. See *e.g.*, *Stone v. Graham*, . . . 449 U.S., at 41 . . . *Epperson v. Arkansas*, 393 U.S. 97, 107-109 . . . (1968); *Abington School District v. Schempp*, . . . 374 U.S. at 223-224 . . .; *Engel v. Vitale*, 370 U.S. 421, 424-425 . . . (1962). Even where the benefits to religion were substantial, as in *Everson*, . . . *Board of Education v. Allen*, 392 U.S. 236 . . . (1968), *Walz*, . . . and *Tilton*, . . . we saw a secular purpose and no conflict with the Establishment Clause.

Id. at 1362 (emphasis added).

In upholding the secular purpose of § 701(j) against an Establishment Clause challenge, the Sixth Circuit exclaimed: "Surely this is a far cry from cases such as *Epperson v. Arkansas*, 393 U.S. 97 (1968), in which the Supreme Court struck down an Arkansas statute prohibiting public schools and universities from teaching the Darwinian theory of evolution." *Cummins v. Parker Seal Co.*, 516 F.2d 544, 552 (6th Cir. 1975). Mandating accommodation of the religious practices of employees in the workplace does not constitute a religious purpose as

would such public school practices as Bible reading, *Engel*, 370 U.S. 421; or recitation of the Lord's Prayer. *Schempp*, 374 U.S. 203. Nor is it a direct support for religion such as state funding of parochial education in *Tilton v. Richardson*, 403 U.S. 672 (1971); and *Board of Education v. Allen*, 392 U.S. 236 (1968); the approval of legislative chaplains in *Marsh v. Chambers*, 463 U.S. 783 (1983), or state financing of theological education in *Witters v. Washington Department of Services for the Blind*, 106 S.Ct. 748 (1986).

The real problem with relying on Senator Randolph's remarks is that the Court must then impute to Congress as a whole the religious motivation thought to dominate the sponsoring Senator. "The argument of one Senator that the proposed legislation would assist a particular pastor and religious group does not require the conclusion that Congress enacted the legislation to promote and support a particular religion." *Cummins*, 516 F.2d at 553. Other remarks of Senator Randolph suggest a legitimate secular motive. The Ninth Circuit looked to Senator Randolph's statement that "the legislation was intended to 'assure that freedom from religious discrimination in the employment of workers is for all time guaranteed in law.' 118 Cong. Rec. 705." *Tooley v. Martin-Marietta Corp.*, 648 F.2d 1239 (1981). It would hardly be consistent with a First Amendment that secures religious freedom to prohibit a Senator from discussing the negative impact of religious discrimination on church membership and attendance when he wishes to convey the need to alleviate such discrimination. Common sense declares that the Senate passed § 701(j) not because of any purpose to promote either Senator Randolph's religion, or minority religions in general, but because it found the Amendment to serve a significant national purpose in alleviating religious discrimination.

As noted in *Wallace v. Jaffree*, 105 S.Ct. 2479 (1985), the religious purpose of a bill's sponsor should not automat-

ically invalidate the bill itself. In *Jaffree*, the Court considered an Alabama statute requiring a moment of silence for "meditation or voluntary prayer" at the beginning of each school day. A previous statute had already provided for a moment of silence. The Court found that "the statute had no secular purpose." *Id.* at 2490 (emphasis in original). Furthermore, "the religious character" of the bill was "plainly evident from its text." *Id.*, at 2491. As Justice Powell observed in concurrence, "the State also . . . failed to identify any non-religious reason for the statute's enactment." *Id.* at 2495. Thus, it was under very narrow and persuasive circumstances that the Court attributed to the Alabama legislature the religious motives of the bill's sponsor. None of those conditions are present in the adoption of § 701(j). Section 701(j) has a very definite secular purpose: to afford members of minority religions equal employment opportunities. Nor is § 701(j) "wholly religious in character." Finally, and conclusively, this Court has already acknowledged that "the paramount concern of Congress in enacting Title VII was the elimination of discrimination in employment," *Hardison*, 432 U.S. at 85, a worthy secular purpose.

2. § 701(j) Has A Non-Discriminatory Secular Effect.

§ 701(j) of Title VII has also been criticized for requiring "that persons receive preferential treatment because of their religion," thus mandating "religious discrimination." *Cummins*, 516 F.2d at 556 (Celebrezze, J. dissenting). The provision is therefore said to lack the requisite neutrality. *Id.* Because such reasoning ignores the common purpose of the religion clauses to protect religious freedom, and because such myopic constitutional analysis is all too prevalent, it is incumbent upon this Court to reinforce the doctrine of religious neutrality that protects the practices of religious minorities.

The type of strict neutrality analysis that would invalidate § 701(j) as an unconstitutional establishment of

religion has been frequently rejected by this Court. As Professor Tribe explained in his text:

The Court has never adopted the so-called "strict neutrality theory," which would hold that "government cannot utilize religion as a standard for action or inaction because [the two religion clauses] prohibit classification in terms of religion either to confer a benefit or impose a burden." (citation omitted).

Tribe, *American Constitutional Law*, 820-821 (1978).

This strict neutrality requirement that Government keep hands off religion would invalidate all government action that singles out religion. If the Court followed such logic, it would have to overturn such judicially approved accommodations of religion as legislative chaplains, *Marsh v. Chambers*, 463 U.S. 783 (1983); exemption from military service for those with religious objections, *Welsh v. United States*, 398 U.S. 333 (1970); military chaplains, *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Brennan, J. concurring); released time from public schools for religious education, *Zorach v. Clauson*, 343 U.S. 306 (1952); and tax exemption of churches, *Walz v. Tax Commission*, 397 U.S. 664 (1970); as well as other judicially created exemptions; *E.g.*, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943); *Sherbert v. Verner*, 374 U.S. 398 (1963); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

The fatal flaw in the logic of "strict neutrality" is that the Free Exercise Clause is not simply a repeat of the Equal Protection language of the Fourteenth Amendment. The Free Exercise Clause singles out religious belief and practice for special, affirmative treatment by government. Justice Douglas, writing in *Zorach v. Clauson*, 343 U.S. 306, rejected an Establishment Clause challenge to a program of released time from public school for religious education, a practice far more favorable to religion than Title VII. He declared:

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe.

343 U.S. at 313, 314. (emphasis added).

Justice Goldberg, concurring in *Schempp*, defined the doctrine of "neutrality" under the First Amendment as being a means of achieving religious liberty, rather than as an end in itself:

[U]ntutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active hostility to the religious. Such results are not only not compelled by the Constitution, but it seems to me, are prohibited by it. . . . Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching about religion, as distinguished from the teaching of religion, in the

public schools. The examples could readily be multiplied, for both the *required and the permissible accommodations* between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the *ultimate First Amendment objective of religious liberty*.

374 U.S. at 306 (emphasis added).

When government singles out religious practice for accommodation it is acting in harmony with the First Amendment. Neither the principles of non-establishment or neutrality are offended by such accommodations. Thus, in *Walz*, 397 U.S. 664 (1970), singling out churches for tax exemption was found to be consistent with the "benevolent neutrality" required of the religion clauses. *Id.* at 669. This principle was reaffirmed most recently in the case of *Bowen v. Roy*, 54 U.S.L.W. 4603 (1986). After citing the Congressional Joint Resolution concerning American Indian religious freedom, the Court said: "that Resolution—with its emphasis on protecting the freedom to believe, express, and exercise a religion—*accurately identifies the mission of the Free Exercise Clause itself*." *Id.*, at 4605-4606 (emphasis added). Clearly, statutes designed to protect the free exercise of religion do not inherently offend the secular purpose requirement of the Establishment Clause.

Although special treatment clearly can be required for religious practice, an issue in this case is whether § 701(j) discriminates against those employees not directly benefited thereby. There are two classes of employees who may allege such discrimination: members of other religions and members of no religion.

There is no discrimination against members of other religions, because the school schedule already accommo-

dates their religious practices. By scheduling vacations to coincide with Christmas and Easter, the vast majority of employees' religious needs are met. *C.f.*, *Sherbert v. Verner*, 374 U.S. 398 (the statute had a special provision for those observing Sunday as a day of rest). Here, in effect, the schedule itself discriminates against all religious persons whose holidays don't fall at the same time as the majority. The purpose of § 701(j) is to restore equality by accommodating the beliefs and practices of religious minorities where they conflict with society in general, and with the employer in particular.

The secular person may complain that he does not receive time off for religious holidays. However, this would be true whether or not Philbrook was accommodated. The status of the secular person is not affected in the slightest by the board accommodating Philbrook's religious practice. If the secular person insists that he ought to be able to take the same time off to go fishing as Philbrook takes to observe his religion, the reply is straightforward. The terms of the bargaining agreement already permit all employees to take off for *legitimate* personal reasons. Religion is recognized as one of those legitimate reasons; fishing is not. It is the validity of the leave that is significant, not its personal nature. Comparison of religious leave with purely recreational purposes is inappropriate. Since the leave provisions already grant other employees as many or more paid personal leave days to meet their secular needs, *Philbrook v. Ansonia Board of Education*, 757 F.2d 476, 485 (2d Cir. 1985), it is Philbrook who is being discriminated against. He does not receive the same number of paid leave days to meet his valid religious needs as others do to meet their secular needs.

This case does not present the issue of whether an employee ought to be permitted paid religious leave where there is no provision for paid personal leave. Nor is

there an issue whether an accommodation would offend Establishment Clause neutrality if Philbrook demanded to be paid for work not done. In that case, it is arguable that Philbrook would be treated not merely equally, but more than equally. Even so, to the extent that other employees are entitled to leave pay for personal reasons, it would violate equal protection not to extend similar benefits to Philbrook. In this case, however, Philbrook offered to make up the time he was absent, thereby being paid only for work actually performed.

As applied to the facts of this case, it is clear that Title VII does not discriminate in favor of Philbrook. To require the school board to adopt Philbrook's proposed accommodation by paying for his religious leave days, and allowing him to make up the hours, would restore Philbrook's employment conditions to parity with other employees. The effect of Title VII in this case is to enforce the legitimate secular goal of securing equal employment opportunities for religious persons. Therefore, the "secular effect" requirement of the *Lemon* test is fully satisfied.

C. The Establishment Clause Is In Harmony With The Protection Of Religious Liberty Afforded By The Free Exercise Clause.

In order to appreciate that Title VII is consistent with the Establishment Clause, the underlying purpose of the Clause must be considered. It has already been demonstrated that the fundamental goal of both religion clauses is to promote and protect religious liberty. Thus, both clauses should "make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary and sponsor an attitude on the part of government that shows no partiality to any one group and lets each flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. at 313 (Douglas, J. concurring). The flexibility of the Establishment Clause

to protect rather than inhibit religion is apparent in Justice Rehnquist's statement that: "one fixed principle in this field is our consistent rejection of the argument that 'any program which in some manner aids an institution with a religious affiliation' violates the Establishment Clause." *Mueller v. Allen*, 463 U.S. 388, 389 (1983) (citations omitted).

A notable formulation of the purpose of the Establishment Clause was stated by Justice Brennan in *Abington v. Schempp*:

"What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religion with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice . . .

When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government.

374 U.S. at 231 (emphasis added).

The religious accommodation provision of Title VII satisfies Justice Brennan's three-part formulation of Establishment Clause purposes. First, § 701(j) does not serve the essentially religious activities of religious institutions. Title VII deals with individuals, while the concern of the Establishment Clause is most frequently with aid to religious institutions. Second, the organs of government are employed not to serve religious interests, but to promote equality among individuals in employment oppor-

tunity. Thirdly, this section utilizes secular and not religious means to accomplish its goal.

Another formulation of Establishment Clause purposes provides: "the establishment clause . . . primarily proscribes 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'" *Nyquist*, 413 U.S. at 772, *quoted in Grand Rapids v. Ball*, 105 S.Ct. 3216, 3222 (1985). Sponsorship, as distinct from financial support, must entail the kind of forbidden government endorsement of religion discussed by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 104 S.Ct. 1355 (1984). It is difficult to take seriously the notion that Congress intended to endorse or sponsor minority religions in general, or Senator Randolph's religion in particular, by enacting the religious accommodation provision of Title VII. As for financial support, Title VII requires no money to be paid by any state or local government. Neither does Title VII require the state to become actively involved in the internal affairs of any religious organization. Mandating religious accommodation in employment differs greatly from the kinds of government involvements with religious activity that the Court has previously struck down as posting the Ten Commandments, reciting the Lord's Prayer and reading the Bible in public school classrooms, *Stone* 449 U.S. 39; *Schempp*, 374 U.S. 204.

Title VII's religious accommodation provision does not offend, but is wholly consistent with Establishment Clause purposes. Indeed, Title VII reflects the sensitivity of the political majority to the religious problems of minorities. It would be ironic to insist that such a statute designed to promote religious freedom offends the First Amendment. The standard of "reasonable accommodation" allows for a fair balancing of interests. Since the *de minimus* language of *Hardison* has been misunderstood as establishing a new standard, it is imperative

that the Court reaffirm the constitutional validity of the "reasonable accommodation" language of § 701(j).

CONCLUSION

Accordingly, *Amicus Curiae* urges this Court to affirm the judgment of the Second Circuit Court of Appeals.

Respectfully submitted,

WALTER E. CARSON, Esq.

ALAN REINACH

JOHNS AND CARSON

Office of General Counsel

GENERAL CONFERENCE OF

SEVENTH-DAY ADVENTISTS

6840 Eastern Ave., N.W.

Washington, D.C. 20012

(202) 722-6105

MOTION FILED

JUN 27 1986

No. 85-495 (18)

IN THE
Supreme Court of the United States
October Term, 1985

ANSONIA BOARD OF EDUCATION, et al.,
Petitioners,

v.

RONALD PHILBROOK,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE,
AND BRIEF AMICI CURIAE, OF AMERICAN JEWISH
CONGRESS IN BEHALF OF ITSELF, THE AMERICAN
CIVIL LIBERTIES UNION, THE ANTI-DEFAMATION
LEAGUE OF B'NAI B'RITH AND THE SYNAGOGUE
COUNCIL OF AMERICA IN SUPPORT OF RESPONDENT
PHILBROOK**

MARC D. STERN

Counsel of Record

LOIS C. WALDMAN

RONALD A. KRAUSS

AMERICAN JEWISH CONGRESS

15 East 84th Street

New York, New York 10028

(212) 879-4500

JACK NOVICK

AMERICAN CIVIL LIBERTIES UNION

132 West 43rd Street

New York, New York 10036

(212) 944-9800

6697

MOTION FOR LEAVE TO
FILE BRIEF AMICI CURIAE

The American Jewish Congress, the American Civil Liberties Union, the Anti-Defamation League of B'nai B'rith and the Synagogue Council of America respectfully move for an order permitting them to file the attached brief amici curiae in support of respondent. Pursuant to Sup. Ct. R.36.2, permission to file was sought from the parties. Respondents Ansonia Federation of Teachers and Philbrook consented, but petitioner Board of Education refused to do so.

The American Jewish Congress is an organization of American Jews founded in 1918, dedicated to the protection of the religious, political, civil and economic liberties of all Americans, but particularly those of American Jews. No liberty enjoyed by Americans is more important to American Jews than religious liberty. For this

reason, the American Jewish Congress has filed many briefs in this Court in cases raising religious liberty issues.

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to preserving and defending the principles embodied in the Bill of Rights. The ACLU is committed to preserving the twin principles of individual freedom to worship and government neutrality in matters of religion embodied in the religion clauses of the First Amendment.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of: the Central Conference of American Rabbis, representing the Reform rabbinate; the Rabbinical Assembly, representing the Conservative rabbinate; the Rabbinical Council of America, representing

the Orthodox rabbinate; the Union of American Hebrew Congregations, representing the Reform congregations; the Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations and the United Synagogues of America, representing the Conservative congregations.

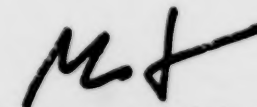
The Anti-Defamation League of B'nai B'rith was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial and religious prejudice in the United States. The Anti-Defamation League has always adhered to the principle, as an important priority, that the above goals and the general stability of our democracy are best served through the separation of church and state and the right to free exercise of religion.

The Anti-Defamation League believes that accommodation of the religious beliefs

of all citizens is essential to preserving the principles upon which this nation was founded and is consistent with the strictures of the religion clauses of the First Amendment.

The statute at issue in this case, the religious accommodation provisions of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e(j), is an important means of insuring that religious liberty is more than an abstract ideal, and its vigorous enforcement is of concern to amici. Nevertheless, amici recognize that this statute could be construed in ways which would violate the Establishment Clause. They seek to file this brief because they believe that the judgment below preserves both the freedom to worship as one chooses and the principle of government neutrality in matters of religion

-- the twin principles embodied in the two
religion clauses of the First Amendment.



Marc D. Stern
American Jewish
Congress
15 East 84th Street
New York, N.Y. 10028

Table of Contents

Table of Contents	i
Table of Authorities	iii
Interest of the <u>Amici</u>	1
Statement of Facts	1
Statement of the Case	9
Summary of Argument	12
Argument	17
I. Respondent Suffered Discrimination Actionable Under Title VII's Ban on Religious Discrimination	17
A. The Proscriptions of Title VII Apply To All Terms, Conditions or Privileges of Employment	17
B. Title VII Bars An Employer From Excluding Religion As An Acceptable Use of Leave Days	23
C. A Collective Bargaining Agreement Provides No Blanket Immunity Under Title VII	29
II. The Court Below Correctly Held That The Question of Undue Hardship Could Not Be Resolved On This Record	34

A. Philbrook Did Not Seek Something For Nothing	34
1. Philbrook's First Proposal	35
2. Philbrook's Second Proposal	37
B. Neither of Philbrook's Proposals Constitutes An Impermissible Preference For Religious Employees	41
III. The Judgment Below Is Entirely Consistent With The Establishment Clause	45
A. Feasonable Accommodation Is Constitutional	45
B. The Accommodations Proposed By Philbrook Do Not Establish Religion	47
Conclusion	54

TABLE OF AUTHORITIES

Cases:

<u>American Motors Corp. v. Dept. of Industry, Labor and Human Relations, 93 Wis.2d 14, 286 N.W.2d 847 (Ct. of Apps. 1979).</u>	46
<u>Americans United v. County of Kent, Mich. App. 293 N.W.2d 723 (1980)</u>	49
<u>Arlan's Dep't Store v. Ky., 371 U.S. 218 (1962)</u>	51
<u>Bradfield v. Roberts, 175 U.S. 291 (1899).</u>	50
<u>Cal. School Emp. Ass'n v. Sequoia Union H.S., 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977).</u>	49
<u>Connecticut v. Teal, 457 U.S. 440 (1982).</u>	32
<u>Connick v. Myers, 461 U.S. 138 (1983).</u>	53
<u>Dewey v. Reynolds Metals, 429 F.2d 324 (6th Cir.), aff'd by an equally divided court, 402 U.S. 689 (1971)</u>	18
<u>Estate of Thornton v. Caldor, Inc, 105 S.Ct. 2914 (1985)</u>	33, 43, 47 52, 53

<u>Everson v. Bd. of Educ.</u> 330 U.S. 1, 15 (1942)	48
<u>Firefighters Local Union v.</u> <u>Stotts</u> , 467 U.S. 561 (1984)	30
<u>Frank v. City of Niles</u> , C-81-0777-Y (N.D. Ohio 1982).	49
<u>Furnco Construction Corp. v.</u> <u>Waters</u> , 438 U.S. 567 (1978)	29
<u>Hishon v. King & Spaulding</u> , 104 S.Ct. 2229 (1984)	19, 20
<u>Hunt v. McNair</u> , 413 U.S. 734, (1973).	48
<u>Hunterdon Central H.S. Bd. of</u> <u>Educ. v. Hunterdon Central H.S.</u> <u>Bd. of Educ. Teachers' Ass'n.</u> , 174 N.J. Super 468, 416 A.2d 980 (App. Div. 1980).	49
<u>Lemon v. Kurtzman</u> , 403 U.S. 602 (1971).	47
<u>Mandel v. Hodges</u> , 54 Cal. App.3d 596, 127 Cal. Rptr. 244 (1976)	49
<u>McDaniel v. Essex Int'l Inc.</u> , 696 F.2d 34 (6th Cir. 1982)	46
<u>Mueller v. Allen</u> , 463 U.S. 388 (1983).	52
<u>Newport News Shipbuilding & Dry</u> <u>Dock Co. v. EEOC</u> , 462 U.S. 669 (1983).	21, 23
<u>Nottelson v. Smith Steel</u> <u>Workers, D.A.L.U.</u> , 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981).	46

<u>Philbrook v. Ansonia Bd. of Educ.</u> , 757 F.2d 476 (2d Cir. (1985)). . .	passim
<u>Pickering v. Bd. of Educ.</u> , 391 U.S. 563 (1968)	53
<u>Protos v. Volkswagen of America</u> , 615 F.Supp. 1513 (W.D.Pa. 1985).	46
<u>Rankins v. Comm'n on Professional Competence</u> , 24 Cal.3d 167, 593 P.2d 852, 154 Cal.Rptr. 907, app. dismissed, 444 U.S. 986 (1979).	45
<u>Rostker v. Goldberg</u> , 453 U.S. 57 (1981)	46
<u>Texas Dep't of Community Affairs v. Burdine</u> , 450 U.S. 248 (1981) . . .	29
<u>Thomas v. Rev. Bd.</u> , 450 U.S. 707 (1981).	51
<u>Tooley v. Martin-Marietta Corp.</u> , 684 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981).	46
<u>T.W.A. v. Hardison</u> , 432 U.S. 63 (1977).	19, 30, 33, 34, 35, 41
<u>U.S. v. Hayes Int'l Corp.</u> , 456 F.2d 112 (5th Cir. 1972).	31
<u>U.S. Postal Service v. Aikens</u> , 460 U.S. 711 (1983)	20
<u>U.S. v. San Francisco Railway Co.</u> , 464 F.2d 301 (8th Cir. 1972).	31

<u>Wallace v. Jaffree</u> , 105 S.Ct. 2479 (1985)	50, 51
<u>Widmar v. Vincent</u> , 454 U.S. 263 (1981).	54
<u>Williams v. New Orleans Steamship Ass'n</u> , 673 F.2d 742 (5th Cir. 1982), cert. denied, 460 U.S. 1038 (1983).	31
<u>Wisconsin v. Yoder</u> , 406 U.S. 205 (1972).	53
<u>Witters v. Washington Dep't of Services For The Blind</u> , 106 S.Ct. 748 (1986).	46, 50
<u>Wygant v. Jackson Bd. of Educ.</u> , 54 U.S.L.W. 4479, (1986).	32, 53

Statutes:

5 U.S.C. §5550a	44
42 U.S.C. §2000e(j)	passim
42 U.S.C. §2000e-2(a)(1).	19
42 U.S.C. §2000e(k)	21
42 U.S.C. §2000e-3(h)	30

Other Authorities:

118 Cong. Rec. 712 (remarks of Sen. Randolph)	24
Equal Employment Opportunity Commission, <u>Guidelines on Discrimination Because of Religion</u> , 29 C.F.R. §1605.2(c)(2)(ii) .	19

INTEREST OF THE AMICI

The interest of the amici is fully set forth in the motion for leave to file a brief amici curiae.

STATEMENT OF FACTS

Respondent Ronald Philbrook, (hereafter "Philbrook"), for over 20 years a business teacher employed by the petitioner, Ansonia Board of Education, (hereafter "Board"), is a member of the Worldwide Church of God. [J.A. 17] That church observes the Old Testament holidays, and teaches that its members may do no secular work on those days, but are instead to attend "Holy Convocations". [J.A. 18-21] Some of these holidays typically fall on days on which regularly scheduled classes take place.

Until the teachers in the Ansonia schools elected to be represented by a union, Philbrook was allowed to take off his religious holidays with no loss of pay.

[J.A. 21-22] The situation changed from the time the respondent,¹ Ansonia Federation of Teachers (hereafter "Union") negotiated its first collective bargaining agreement. Although the Board allowed -- and continues to allow -- Philbrook to be absent on his religious holidays, and insists that in so doing it has accommodated his religious beliefs, [J.A. 54] from that time on he began to be docked pay, as he was absent for holidays in excess of the days allocated for personal leave days under the contract. [J.A. 22]

The number of days which teachers might take off during the school year has always been a contested subject during the collective bargaining between the Board and

¹ The Ansonia Federation of Teachers (hereafter "Union") did not join in the petition for certiorari, and hence is a respondent, although supporting the position of the Board, Sup. Ct. R. 19.6.

the Union. [See, e.g., J.A. 73-101]

All of the contracts since 1967 have allowed for three days a year of paid leave for religious holiday observances. [J.A. 74, 75, 77, 80, 83, 86, 89, 92-93, 95, 99] Philbrook testified that the number of days for religious observances "was [chosen] for the religious purposes of the Jewish population at this time." [J.A. 24]

The contracts also provided for additional leave days for a variety of purposes, including illness, deaths in the family, weddings, graduation, service as a delegate to a veterans' organization, and, crucially, the transaction of "personal business." [See, e.g., J.A. 73, 75, 77, 79, 80, 82, 85, 88-89, 91-93, 94, 98-99]

The conditions under which these personal business days might be used have varied. The 1967-68 agreement provided for 5 days leave for "personal or legal" reasons. [J.A. 72] The next year's

contract provided that they were to be granted only at the Superintendent's discretion. [J.A. 74] The contract was changed in 1969 to provide for three days personal business leave, "at the teacher's discretion but not including marriage or travel for personal or family convenience." [J.A. 76]

The personal business leave provision was again amended in 1971 to exclude purposes covered by other provisions of the contract. Otherwise, the days were usable wholly at the teacher's discretion. [J.A. 83] The provision was amended in 1975 to again require the approval of the Superintendent. [J.A. 89]

The leave provision was amended in 1982, so that one day was "granted at the discretion of the professional staff, except that the day may not be used for purposes for which other provision is made in the contract." [J.A. 95] The remaining two

days require administrative approval, although "reasons for such leave may be stated in general terms if the professional staff member is concerned with protecting the confidential nature of the personal business." Id.

At first, as the Board has always agreed he might do, Philbrook simply took off on his religious holidays, absorbing the loss of income. [J.A. 22] Later, however, as the loss of income began to become more substantial, and having filed complaints of religious discrimination with the Connecticut Commission of Human Rights and the E.E.O.C., he made two proposals which would have allowed him to be accommodated with a minimal loss of income. [J.A. 22] First, he proposed that he be allowed to use the three personal business days for religious purposes, paying the costs of a substitute teacher. [J.A. 22-24] In addition, he offered to make up at other

times classes he missed, an offer which included payment of the costs of substitutes the class time lost. [J.A. 24]

Because neither proposal was accepted, and Philbrook could no longer bear the resulting loss of income, in 1976 he began to schedule medical appointments on his religious holidays so that he could be paid. While such scheduling did not allow him to attend church services, it did allow him to avoid secular work. [J.A. 26-28; 35-39]

The Superintendent of Schools testified that, under the contract as it stood at the time of trial, it was one of his duties to police the use of religious leave days by teachers. He testified that teachers were required to give 48 hours notice of their intention to use those days, but that as to one of these days, teachers needed no advance approval. [J.A. 51-52; 64] As to that day, the Superintendent was, however, empowered to deny leave, if by chance he

learned that it was used for an impermissible purpose. [J.A. 53, 64-65] There was no testimony as to how often, if ever, this occurred. As to the remaining personal business leave days, prior permission was needed, [J.A. 52-53] although, as noted, the reasons for leave could be stated in general terms. [J.A. 99-100]

In an effort to demonstrate that paying Philbrook for the absences it was allowing him to take would cause undue hardship, the Board produced testimony from the Superintendent of Schools that, because of the difficulty in obtaining certified substitutes, particularly in specialties like Philbrook's (business) the absence of a teacher meant that no learning took place. [J.A. 55-59] Moreover, the Superintendent testified that some substitutes were unable to control their assigned classes, with

damage resulting to business equipment.

[J.A. 57-8]

In rebuttal, Philbrook testified that when he was to be absent for a religious holiday he prepared work in advance which students could do when he was absent. Philbrook testified that this procedure enabled him to tell whether any work was accomplished by his students. He also testified that his students have always remained in their classroom doing work in his absences. [J.A. 68-70] The District Court never resolved this conflict in the evidence.

STATEMENT OF THE CASE

After efforts at conciliation failed, and Philbrook received a right to sue letter, suit was brought in the United States District Court for the District of Connecticut. A two day trial was held.

The District Court entered judgment for the Board. Its entire holding on the reasonableness of the Board's proposed accommodation follows:

[P]laintiff was not subject to any power to attend or not attend any holy day service. He could go without let or hindrance whenever and wherever he wished. He might lose some pay or even his job. The plaintiff did not want it that free. He wanted it to be free as far as his desire or obligation permitted plus pay. That is why he said he did not exercise his "unfettered right to worship, it would cost him money - not that he was prevented." He testified he used to go even after he used his three days but he got tired of having to lose pay for not working.

§2000e-2(j) specifically prohibits an employer granting preferential treatment to any individual because of race, color, religion, etc. But there must be a

reasonable accommodation by the employer, General Electric Co. v. Gilbert, 429 U.S. 125 (1977). Congress got the message as it related to government employees and the next year (1978) it passed and the President approved P.L. 95-390, 5 U.S.C. 5550a, which provides for Government employees' compensatory "time off" for religious observances, wherein an employee who elects to work certain overtime is granted equal compensatory time off from his scheduled tour of duty (in lieu of overtime pay) for such religious reasons. In sum, the accommodation is overtime work for equal compensatory time off - plaintiff agrees with everything except the work part. He received time off after 3 paid days without pay.

A divided Court of Appeals reversed the judgment and remanded the case for further fact-finding. The Court of Appeals presumed that the Board's policy of allowing three paid religious holidays and the remainder as unpaid leave was reasonable. Nonetheless, it held that, where there were multiple reasonable accommodations, "Title VII requires the employer to accept the proposal the employee prefers unless the accommodation causes undue hardship on the

employer's conduct of his business."

Philbrook v. Ansonia Bd of Educ., 757 F.2d
476, 484 (2d Cir. 1985)

Having so held, the majority in the Second Circuit held that the District Court on remand must make factual findings as to whether either of Philbrook's proposals would cause undue hardship. As to the first proposal, that the restriction on using personal business leave days for religious observances be dropped, the Court framed the inquiry as follows:

The critical factual question concerning this proposal is the past and current scope of the personal business leave provisions ... whether any such day may be taken for any reason except those specifically mentioned, such as religious reasons. ... The presence of a contract provision that allows leave for limited secular activities, such as sick leave or leave for court appearances, does not show that additional paid leave for religious observance in lieu of personal business leave would not cause undue hardship. Employers and unions must be free to outline specific types of paid leaves in a contract without the threat of being charged with

religious discrimination. But if the personal business leave provision is as broad as appellant claims, it becomes difficult to believe that dropping the religious exception causes undue hardship.

As to Philbrook's proposal to reschedule missed classes, the Court of Appeals ordered the District Court to inquire as to the educational and fiscal costs which would be imposed by that proposal.

Finally, the Court concluded that neither proposal would grant Philbrook an impermissible religious preference, for, "differential treatment cannot be equated with privileged treatment." 757 F.2d at 487.

SUMMARY OF ARGUMENT

1. The Title VII requirement that employers reasonably accommodate religious practice requires that an employer implement the accommodations which, while causing no undue hardship, cause the employee the least

burden. This result follows inexorably from the statutory prohibition on discrimination in "compensation, terms, conditions or privileges of employment." It follows that the fact that a partial accommodation has been made is not conclusive of Philbrook's claims.

2. Where an employer grants its employees leave days they can use for a wide variety of reasons, it may not deny them the right to use those days for religious days. In this case, it is not clear whether the personal business leave days are so available, or whether their use is limited to some narrow class of uses. Because the District Court made no factual finding, the Court of Appeals correctly remanded the case for an inquiry into the actual operation of the personal leave days.

3. The Board's argument, based on T.W.A. v. Hardison, 432 U.S. 63 (1971) that

provisions of a collective bargaining agreement are immune from the duty to accommodate is untenable. Not only did Hardison involve the protection of a seniority system, but Hardison itself noted that a contract could not be used to violate Title VII. Collective bargaining agreements are designed to protect the interests of majorities; Title VII those of individuals. Hence, a collective bargaining agreement cannot immunize an employer's conduct from Title VII scrutiny.

4. Neither of the accommodations proposed by Philbrook called for preferential treatment, or, on their face, create undue hardship. Philbrook is not entitled by virtue of Title VII to something for nothing; however, neither of Philbrook's proposals sought something for nothing. Philbrook's proposal for dropping the restriction on the use of personal business days sought not a subsidy, but the right to

use days off earned by him. The second proposal simply called for a rescheduling of his class schedule. While it is conceivable that the Board could demonstrate that rescheduling classes would cause it undue hardship, it was equally likely that such a shift would cause it no harm.

More to the point, in evaluating the Board's claims of undue hardship caused by Philbrook's absences, it is necessary to bear in mind that however this case turns out, Philbrook will be absent on his days off. The Board does not contend here -- and has never contended -- that Philbrook is not entitled to absent himself. The only question is whether he may be paid for those days. For this reason, evidence of educational disruption would appear to be irrelevant.

5. Accommodating Philbrook would not disadvantage any other employee. Under either, he would give full economic value

for his pay. Unless any accommodation is a preference, Philbrook cannot be said to demand an illicit preference.

6. This Court, and every Court of Appeals which has considered this issue, has upheld the constitutionality of reasonable accommodation. The Board's further argument that Philbrook seeks a religious subsidy has no merit either on the facts or the law. Because Philbrook has earned the right to these personal leave days, their use by him for religious purposes is no more a government subsidy for religion than a government employee's donation of his paycheck to a synagogue.

Application of the three-part test leads to the same result. Accommodating Philbrook does not suggest any purpose other than the elimination of religious discrimination. The primary effect of accommodation is the same -- particularly

since, by definition, accommodation is inevitably a response to individual choice.

I. ARGUMENT

A. Respondent Suffered Discrimination Actionable Under Title VII's Ban On Religious Discrimination

The central premise of amici's position is simply stated: the Title VII requirement that employers "reasonably accommodate" an employee's religious practice requires the employer to choose the accommodation placing the least burden on the employee which creates no undue hardship on the conduct of the employer's business. The judgment of the Court of Appeals remanding this case for further fact-finding on the question of undue hardship is entirely consistent with this principle and should be affirmed.

Title VII of the 1964 Civil Rights Act reflects the particular importance of religion and religious practice to the

American people. After all, only religious belief and practice are protected by the statute. No matter how important to the individual, political, social or ethnic observances, even those related to race, sex or national origin, are not protected.

The inclusion² of religious practices within the definition of "religion" for Title VII purposes affords employees' religious practices the full panoply of substantive rights guaranteed by Title VII. Thus, an employer may not discriminate on the basis of religious belief or practice in any of the "compensation, terms, conditions or

² In the wake of decisions casting doubt on the scope of Title VII's ban on religious discrimination, see, e.g., Dewey v. Reynolds Metals, 429 F.2d 324 (6th Cir.), aff'd by an equally divided court, 402 U.S. 689 (1971), Congress redefined the term "religion" for Title VII purposes to include discrimination sounding in employee religious practice or religious faith, 42 U.S.C. §2000e(j).

privileges of employment," 42 U.S.C.
§2000e-2(a)(1).

For this reason, this Court has held

A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all. Those benefits that comprise the "incidents of employment" ... or that form "an aspect of the relationship between the employer and employees" ... may not be afforded in a manner contrary to Title VII.

Hishon v. King & Spalding, 104 S.Ct. 2229, 2234 (1984).³

The one exception to the general rule is that a religious practice discrimination claim is rebutted by a showing that accommodation would cause "undue hardship", T.W.A. v. Hardison, 432 U.S. 63 (1971).

Since Philbrook is denied equal compensation for observing his religious

³ The Equal Employment Opportunity Commission reached the same conclusion in its Guidelines on Discrimination Because of Religion, 29 C.F.R. §1605.2(c)(2)(ii).

practices, it follows that, unless the Board demonstrates undue hardship, Philbrook is the victim of illegal discrimination.

The Board [Brief at 12-15] argues⁴ that, because Philbrook is allowed to take off on his religious holidays (albeit some as leave without pay) and keep his job, it has reasonably accommodated him and is not obligated by Title VII to do more. However, the interests protected by Title VII go beyond the mere right to hold a job, Hishon v. King & Spalding, supra, but include the right to be treated equally with regard to "compensation terms, conditions or privileges of employment." Therefore, the

⁴ Both the Board [Brief at 12-15] and Union [Brief at 4-15] argue that Philbrook did not make out a prima facie case of religious discrimination. Since this case was fully tried on the merits, "it is surprising to find the parties ... still addressing the question whether [Philbrook] made out a prima facie case," U.S. Postal Service v. Aikens, 460 U.S. 711, 714 (1983), thus "unnecessarily evad[ing] the ultimate question of discrimination vel non." Id

fact that Philbrook is forced to accept diminished earnings is within the scope of Title VII, even though he has not lost his job.⁵

For example, in Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983), this Court held that the Pregnancy Discrimination Act, 42 U.S.C. §2000e(k), prohibits an employer from excluding even the spouse of an employee from pregnancy health insurance coverage. It specifically rejected the argument that this form of discrimination was too insignificant to be illegal. A fortiori, the loss of

⁵ Different jobs pay different salaries, provide different promotional and advancement opportunities, have different work loads, call for the use of different skills, provide varying psychic or professional satisfaction, desirable hours or other fringe benefits, including vacation time. The statutory protection of right to be free from discrimination in "compensation, terms, conditions or privileges and of employment" is a recognition of this reality.

income caused Philbrook by the Board's refusal to consider a more complete accommodation is also discrimination under Title VII.

The argument of amicus AFL-CIO [Brief at 9] that Title VII protects only against a loss of employment rests on the faulty premise that, because the legislative history of §2000e(j) focused on the loss of employment, the applicability of that section should be similarly constricted.⁶ However, the relevant legislative history is brief, and its silence as to discrimination less severe than loss of employment does not subvert the plain meaning of the statute any more than did the legislative silence in

⁶ Amicus AFL-CIO also argues (Brief at 11-12] that its parsimonious reading of Title VII is necessary in order to avoid a substantial constitutional question. For the reasons stated in Point III, infra, the judgment below creates no constitutional difficulties.

Newport News Shipbuilding & Dry Dock Co. v. EEOC, supra.

The accommodation implemented by the Board did not provide for non-discriminatory treatment of Philbrook in "compensation, terms, conditions or privileges of employment"; that it partially accommodated Philbrook therefore does not suffice to free the Board of Title VII liability.⁷

B. Title VII Bars An Employer From Excluding Religion As An Acceptable Use of Leave Days

Philbrook is required by his religion to abstain from gainful employment on the

⁷ There is yet another reason why Philbrook's partial accommodation is not conclusive. The discrimination worked by the Board's policy is the result of impermissible religious discrimination. Philbrook testified -- and his testimony is un rebutted on this crucial point -- that the number of religious observance leave days "was [chosen] for the religious purposes of the Jewish population at this time." [J.A. 24] The Board incorrectly asserts [Brief at 17, n.6] that "there is no evidence in the record that the leave provision was designed to prefer one religious group over another."

Old Testament holidays, some of which fall on school days. The number of days involved varies with the calendar, but it almost always exceeds the three days a year the collective bargaining agreement sets aside for religious observances. Philbrook has either been docked several days pay a year [J.A. 22] or, in more recent years, felt compelled either to violate the tenets of his faith in order to adequately provide for his family⁸ or to schedule medical appointments for those days, thus justifying use of paid sick leave days and eliminating the loss of income. [J.A. 25]

⁸ The Court of Appeals correctly held that the Board having forced Philbrook to choose between supporting his family and his religious beliefs, cannot contend that his decision to prefer his family evidences insincerity precluding his invocation of Title VII. It was precisely to avoid such conflicts that 42 U.S.C. §2000e(j) was enacted, 118 Cong. Rec. 712 (remarks of Sen. Randolph).

The Board insists that it may, consistent with its obligations under Title VII, refuse to allow Philbrook to use any personal business days for religious purposes. The court below, in remanding this case for further fact finding, did not reject that view outright. Rather, it correctly held only that the District Court, which erroneously held that the Board's offer of partial accommodation satisfied its duty under Title VII, had failed to make factual determinations necessary to resolve Philbrook's claims. Specifically, the District Court failed to determine the scope of permissible uses, in actual practice, of the personal business leave days.

If paid personal business leave days may, in fact, be used for any, or practically any, purpose, Ansonia's policy of excluding religious uses would violate Title VII, for it would constitute precisely the type of interference with, and penalty

for, religious observance §2000e(j) makes illegal. On the other hand, if the permissible category of uses, in actual practice, was tightly constricted to some narrow category of "business" uses, so that these days were not broadly available for use at a teacher's discretion, Title VII would not be violated by the challenged policy.

Because the District Court did not determine whether the personal business leave days, or part of them, could be so used at the discretion of teachers, it ordered the case remanded to the District Court to determine whether the three days, or any of them, could be used "for any purpose whatever," or whether, in fact, they were limited to a limited range of special and unusual circumstances. On the facts presented here, that judgment is unassailable.

Given the vagueness of the collective bargaining agreement's broad leave provisions, see p. 2-7, supra, and its apparent availability for a wide variety of personal purposes, the Court of Appeals correctly ordered the District Court to consider the actual operation of the personal business leave days.

At trial, there was conflicting evidence concerning the extent to which the Board in fact policed the personal business leave provisions, either as to the first day, by contract usable wholly at a teacher's discretion subject only to post hoc enforcement by school officials if they chanced to learn of an impermissible use [J.A. 95], or the remaining two leave days for which permission must be sought in advance. [J.A. 51-2, 53-4, 61, 65] (testimony of Superintendent of Schools)

The contract itself does little to restrict the use to which these personal

leave days may be used aside from prohibiting the few specified uses which are covered by other contractual provisions. On the contrary, it explicitly permits teachers to describe the purposes for which they seek the two discretionary personal business leave days in broad terms, to protect teacher privacy in regard to the precise purposes to which the days will be put. [J.A. 99] Actual and effective restrictions, if any, on the use of personal business leave days exist, if at all, outside the four corners of the

contract.⁹ Because this case turns in large part on resolution of this factual question, the Court of Appeals properly ordered a remand.

C. A Collective Bargaining Agreement Provides No Blanket Immunity Under Title VII

Merely because the alleged discrimination is embodied in a collective bargaining agreement does not shield it from Title VII. The Board's claim [Brief at 27-28] that Title VII never requires an

⁹ The court below held, 757 F.2d at 484, without citation of case authority or legislative history, that, where both employer and employee propose reasonable accommodations not creating undue hardship, Title VII requires the employer to accept the proposal the employee prefers.

This view cannot be sustained. Nothing in the legislative history, supports a rule requiring an employer to accept an employee's proposal. Absent discrimination, the Act imposes no duty on employers to maximize the employment of members of protected groups, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978).

employer to deviate from the terms of a collective bargaining agreement is plainly untenable.

In support of its argument, the Board points to T.W.A. v. Hardison, supra, where this Court held that the duty to accommodate did not obligate an employer to unilaterally abrogate a bargained for seniority system, for (432 U.S. at 79) "we do not believe that the duty to accommodate requires ... steps inconsistent with the otherwise valid agreement."

However, Hardison is readily distinguishable on a number of grounds. First, it involved not just any provision of a collective bargaining agreement, but a seniority provision, which enjoys special protection under Title VII, 42 U.S.C. §2000e-3(h), Firefighters Local Union v. Stotts, 467 U.S. 561 (1984).

Second, this Court in Hardison specifically noted that "a collective

bargaining agreement may not be employed to violate [Title VII]". Unless justified by a showing of undue hardship, the exclusion of religious days as a permissible use of days otherwise broadly available for personal business use (should that prove to be the case) is an agreement to violate the statute, which grants protection to such observances, in denigration of Philbrook's statutory rights. Finally, to accept the Board's argument would immunize contractually arranged discrimination from the scope of Title VII -- a result that has been repeatedly rejected.¹⁰

This result follows inexorably from the different interests protected by Title VII, on the one hand, and collective bargaining

¹⁰ See, e.g., Williams v. New Orleans Steamship Ass'n, 673 F.2d 742 (5th Cir. 1982), cert. denied, 460 U.S. 1038 (1983); U.S. v. San Francisco Railway Co., 464 F.2d 301 (8th Cir. 1972); U.S. v. Hayes Int'l Corp., 456 F.2d 112 (5th Cir. 1972).

agreements on the other. Collective bargaining contracts reflect the concerns of bargaining unit majorities. Subject only to the duty of fair representation, a union must seek a contract which furthers the interests of a majority of its members; the rights of minority members must yield for the sake of the common good. Title VII, by contrast, protects the rights of individuals; those rights cannot be whittled away by union majorities, Wygant v. Jackson Bd. of Educ., 54 U.S.L.W. 4479, 4481, n.4 (1986) (plurality opinion of Powell, J.); cf. Connecticut v. Teal, 457 U.S. 440 (1982).

A blanket rule that no provision of a union contract need be waived to accommodate religious practices, even if the provision in question did not adversely affect any other employee or create undue hardship, would eviscerate 42 U.S.C. §2000e(j) for

any worker subject to a collective bargaining agreement.¹¹

Only a wooden insistence on enforcing a contractual provision as written, without regard to the important values protected by Title VII, could justify an objection to a waiver of the contractual provision under such circumstances. Hardison does not require such a draconian rule.

Of course, where an accommodation of one employee's religious practice has the effect of depriving other employees of their rights, then the Establishment Clause may impose some limitations, Estate of Thornton v. Caldor, 105 S. Ct. 2914 (1985). However,

¹¹ A readily available accommodation is to make up time lost for religious observance by working past the end of the normal workday. Many union contracts, however, provide that such work must be paid at premium overtime rates. If make-up time for religious observance is subject to such contractual provisions, there will frequently be a more than de minimis cost to the employer, thus excluding this common form of accommodation.

in this case, invalidating the religious observance restriction on the use of personal business leave days does not deny rights to any other employee.¹²

II. The Court Below Correctly Held That The Question of Undue Hardship Could Not Be Resolved On This Record

A. Philbrook Did Not Seek Something For Nothing

The Board [Brief at 25-31] contends that either of Philbrook's proposed further accommodations would, on the basis of his religion, result in his being paid for not working or, phrased somewhat differently, impermissibly grant Philbrook preferential benefits not accorded other employees on the basis of religion. It claims that, under Hardison, Philbrook has no statutory entitlement to such a preference; that,

¹² The judgment below properly left open the question of whether Philbrook's proposals impose more than a de minimis cost on the Board, see pp. 35-41, infra. It thus cannot now be said that the judgment imposes a substantial cost on the employer.

on the contrary, such preferences are proscribed.

Philbrook is, of course, not entitled to something for nothing. Any such windfall would grant him preferred employment opportunity, in violation of well settled, indeed fundamental, Title VII principles, T.W.A. v. Hardison supra, and, possibly, the Establishment Clause as well, see Point III, infra. Moreover, requiring an employer to incur financial costs for which no reciprocal economic value is returned by the employee would constitute more than de minimis hardship, T.W.A. v. Hardison, supra. Such is not the case here.

1. Philbrook's First Proposal

Philbrook offered two distinct accommodations. First, he suggested that he be permitted to use the three paid personal business days for religious observance.

[J.A. 23-25] He suggested only the dropping of the prohibition on using these

three¹² days for religious purposes, in effect analogizing religious observances to visits to the hardware store, the hairdresser, the real estate agent or a job interview. He did not seek an unlimited, unusual, subsidy for his religious observances.

Each teacher in Ansonia "earns" the right to use these three days for personal business by performing his or her normal duties. It is true that a teacher need not take these days and that many do not.

[J.A. 60] Nevertheless, each teacher has "earned" the right to three paid personal leave days. They are as much a part of the "compensation, terms, conditions or

¹² Philbrook does not seek an unlimited number of paid leave days for purposes of religious observance; the contrary suggestion of the Board [Brief at 11, 19, 21] that an affirmance would mandate that employers provide an unlimited number of paid religious holiday days, is simply wrong.

privileges" of employment in the Ansonia school system as a paycheck. Philbrook has paid full economic value for those days by performing his teaching duties, and hence his claim to use these days for religious purposes cannot be dismissed as a claim for a subsidy.

2. Philbrook's Second Proposal

Second, Philbrook offered to make up the time "if possible" [J.A. 25], an offer the Court below understood, 757 F.2d at 486, to include payment of a substitute's wages. In evaluating the Board's claim of undue hardship in response to this claim, it must be emphasized that the Board's objection is not to Philbrook's absence, since it allows Philbrook to absent himself on all his religious holidays. It objects only to paying him for his religious holidays. Thus, any claim of harm to the educational process would appear to be irrelevant to the Board's defense in this case. In any event,

the School Board made no effort at trial to prove that it was not possible for Philbrook to make up the classes he missed.

It is surely conceivable that Philbrook could reschedule the classes he missed during lunch hours, study periods, before or after school or at some other time. Perhaps there is some reason why this alternative would not work or why it is educationally unsound. The judgment of the court below does not preclude the Board from making such a showing. It merely holds that the Board must in fact do so before it could reject Philbrook's proposal.

The Board did adduce testimony tending to prove that substitute teachers, particularly those who are not certified in a particular area (in Philbrook's case, business skills) typically are unable to carry on meaningful instruction. [J.A. 55-9] The School Superintendent also testified that there were "very few business

certified substitutes available." [J.A. 56]
The Superintendent also testified that
equipment was typically damaged when
substitutes were in a classroom. [A-73-74]

In this Court, the Board argues that "a
loss of school system efficiency" [Brief at
26] constitutes more than a de minimis cost
sufficient to establish undue hardship. Of
course, any substantial interference with
the educational mission of Ansonia's schools
would constitute undue hardship although, as
noted, the Board is willing to accept that
interference when it is caused by
non-religious absences, and is willing to
tolerate it for religious observances so
long as Philbrook does not seek to be paid
for his absences.

There remain, moreover, additional
unresolved factual issues on the undue
hardship issue. Philbrook contends that for
each holiday on which he was to be absent,
he prepared assignments which allowed him

(and would have allowed school officials) to determine whether instruction had in fact taken place. [J.A. 68-70]

As to possible damage to equipment, the School Superintendent could only guess that damage took place when Philbrook was absent -- he admitted that he did not know whether it in fact took place. [J.A. 59] Moreover, Philbrook's absences were fundamentally different than the run-of-the-mill teacher absence, known to school officials at most a day or two beforehand. [J.A. 55-56] Philbrook's absences were known well in advance, and hence allowed petitioners greater time to locate qualified substitutes.

Finally, and perhaps most tellingly, petitioners' claims of hardship deserve the most critical scrutiny because they are not objecting to Philbrook's absence as such; on the contrary they concede Title VII requires that Philbrook be allowed to absent himself

[Brief at 17]; rather the Board objects only to ameliorating the financial impact of Philbrook's absences.

This Court's opinion in T.W.A. v. Hardison, supra, found that the employer had demonstrated undue hardship only upon a record which fully explored all of the proposed accommodations and their costs to T.W.A. While much, but not all, of the necessary evidence was in fact introduced in this case, the District Court failed to resolve crucial factual disputes concerning various conflicts in the evidence. Hence, the court below correctly ordered further fact finding on the undue hardship issue.

B. Neither of Philbrook's Proposals
Constitutes An Impermissible
Preference For Religious Employees

Petitioners contend [Brief at 28] that Philbrook seeks a discriminatory preference on the basis of religion in violation of Title VII:

[R]equiring the school board to implement either of Philbrook's accommodation proposals, additional leave with full pay or additional paid leave less the cost of a substitute, would result in preferential treatment contrary to the intent and purpose of Title VII.

At the outset, it should be noted that the School Board has simply misstated Philbrook's proposals. Contrary to the Board's repeated assertions [Brief at 11, 17, 21], Philbrook does not seek unlimited additional paid leave, only the invalidation of a restriction barring the use of existing paid leave provisions for religious observances.

This first proposal is hardly a preference for religion. On the contrary, it is the present rule which constitutes a preference for non-religious personal business activities. It is one thing to hold that government may not "command[] that Sabbath religious concerns automatically control over all secular

interests at the workplace," Estate of Thornton v. Caldor, Inc., supra, 105 S.Ct. at 2918; it is quite another to say, as the Board does here, that government agencies may relegate religion to second-class status vis-a-vis secular concerns.

Philbrook's second proposed accommodation was that he be paid his ordinary salary, that he make up lost instructional time and that he pay for the additional (but lower) costs of a substitute. Under this proposal, as well, Philbrook would give full economic value for the accommodations he suggests. Adopting his solution confers no preference in any meaningful sense.

Furthermore, with respect to both of Philbrook's proposals, no other employee is disadvantaged or forced to involuntarily undertake additional, or undesirable, employment -- key indicia of an impermissible preference.

Of course, Title VII's accommodation provisions require that employees with religious practices be treated differently from other employees. Allowing a swap of shifts, or, as here, allowing extra days off with or without pay, or allowing federal employees to earn compensatory time to cover religious absences, see, 5 U.S.C. §5550a, or the dozens of other accommodations which have been required or approved in other circumstances, are all forms of special treatment. Such preferences, if so they be, are an inescapable element of any accommodation of a religious practice which requires actions which diverge from the cultural norm. Unless Congress acted unconstitutionally in amending Title VII to require reasonable accommodation of religious practices, this much preference must be allowed.

III. The Judgment Below Is Entirely
Consistent With The Establishment
Clause

A. Reasonable Accommodation is
Constitutional

The Board contends that [Brief at 30-31]

implementation of either of Philbrook's proposals ... would require the school board to alter existing work rules regarding paid leave solely because of Philbrook's religious beliefs. Such action would advance religion in violation of the first amendment.

The argument is advanced by the Board without supporting authority.

The constitutionality of "reasonable accommodation" has been summarily upheld by this Court, Rankins v. Comm'n on Professional Competence, 24 Cal.3d 167, 593 P.2d 852, 154 Cal.Rptr. 907, app. dismissed, 444 U.S. 986 (1979), and, in the context of Title VII specifically, by each of the Courts of Appeal which have considered the

question.¹⁴ These results are buttressed by the strong presumption of constitutionality attaching to an act of Congress, Rostker v. Goldberg, 453 U.S. 57 (1981).

But the same result follows application of the well settled three part test which this Court applies in Establishment Clause cases -- that a statute have a secular purpose, that it have a primary secular effect, and that it not unduly entangle government with religion, see, e.g.,

¹⁴ McDaniel v. Essex Int'l Inc., 696 F.2d 34 (6th Cir. 1982); Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir.), cert. denied, 454 U.S. 1098 (1981); Nottelson v. Smith Steel Workers, D.A.L.U., 643 F.2d 445 (7th Cir.), cert. denied, 454 U.S. 1046 (1981); Accord, Protos v. Volkswagen of America, 615 F. Supp. 1513 (W.D.Pa. 1985); See also, American Motors Corp. v. Dept. of Industry, Labor and Human Relations, 93 Wis.2d 14, 286 N.W.2d 847 (Ct. of App. 1979 (state statute)).

Witters v. Washington, 106 S.Ct. 748 (1986);
Lemon v. Kurtzman, 403 U.S. 602 (1971). As
Justice O'Connor, wrote, concurring in
Estate of Thorton v. Caldor, Inc., supra,
105 S.Ct. at 2919:

[A] statute outlawing employment discrimination based on race, color, religion, sex, or national origin has the valid secular purpose of assuring employment opportunity to all groups in our pluralistic society. See Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 90 n.4 (1977). (Marshall, J., dissenting). Since Title VII calls for reasonable rather than absolute accommodation and extends that requirement to all religious beliefs and practices rather than protecting only the Sabbath observance, I believe an objective observer would perceive it as an anti-discrimination law rather than an endorsement of religion or a particular religious practice.

B. The Accommodations Proposed
By Philbrook Do Not Establish
Religion

Recognizing the general rule that religious accommodation does not violate the Establishment Clause, the Board rests its argument on mischaracterizing Philbrook's

proposals¹⁵ as demanding "special employment preferences" (Brief at 30). His proposals are said to "aid one religion, aid all religions, or prefer one religion over another, Everson v. Bd. of Educ. 330 U.S. 1, 15 (1947)." Although the argument is cryptic, it appears that the Board is suggesting that granting additional paid leave would amount to a compelled subsidy for religious practice, and would therefore have the unconstitutional direct effect of advancing religion, cf. Hunt v. McNair, 413

¹⁵ The Union's challenge rests solely on the Second Circuit's reading of the statute, which requires automatic deference to an employee's proposed accommodation -- a reading both incorrect and unnecessary to support the judgment, see p. 29, n.9, supra. Since this Court reviews only judgments, not opinions, it need not reach the Union's constitutional contentions.

U.S. 734, 742-43 (1973).¹⁶

Philbrook does not seek paid leave for all of his religious holidays, see supra, p. 42. Rather he seeks either to use paid leave which, he alleges, is in fact generally available for personal purposes, or to be allowed to make up lost days by rescheduling his classes.

Philbrook thus does not seek a gratuity or a subsidy, but the right to enjoy the earned "compensation, terms, conditions or

¹⁶ The Board does not challenge, as an unconstitutional subsidy, the three religious leave days. The state courts are divided over the constitutionality of similar contractual arrangements. Compare Hunterdon Central H.S. Bd. of Educ. v. Hunterdon Central H.S. Teachers' Ass'n, 174 N.J. Super 468, 416 A.2d 980 (App. Div. 1980) (unconstitutional) with Cal. School Emp. Ass'n v. Sequoia Union H.S., 67 Cal. App. 3d 157, 136 Cal. Rptr. 594 (1977); Americans United v. County of Kent, Mich. App. ___, 293 N.W.2d 723 (1980) (constitutional). Cf. Mandel v. Hodges, 54 Cal. App. 3d 596, 127 Cal. Rptr. 244 (1976) (Good Friday afternoon as paid vacation day); Frank v. City of Niles, C-81-0777-Y (N.D. Ohio 1982) (same). Amici express no view on this issue.

privileges" of his employment. That is no more an impermissible subsidy than exists when the "State ... issue[s] a paycheck to one of its employees, who may ... donate all ... of that paycheck to a religious institution," Witters v. Washington Dep't of Services For The Blind, 106 S.Ct. 748, 751 (1986); cf. Bradfield v. Roberts, 175 U.S. 291 (1899).

The same result obtains under the three part test. If granted, neither of Philbrook's proposals would suggest that "government's actual purpose is to endorse or disapprove of religion," Wallace v. Jaffree, 105 S.Ct. 2479, 2490 (1985). Surely, treating all forms of religious observance in the same way as absences to transact personal business are treated suggests no endorsement of religion, Witters v. Washington Dep't of Services For The Blind, supra; on the contrary, singling out religion for adverse treatment might

legitimately be seen as "disapproval" of religion by the School Board.

The primary effect of adopting Philbrook's proposals, under the limitations imposed by the judgment below, would not be to subsidize or advance religion. The only sense in which religion is aided in the Establishment Clause sense if either of Philbrook's proposed accommodations is adopted is the elimination of what amounts to a penalty for observing religious practices more demanding than the norm. That is no more an establishment than the accommodations upheld against Establishment Clause challenge in a variety of contexts, see, e.g., Thomas v. Rev. Bd., 450 U.S. 707 (1981); Arlan's Dep't Store v. Ky., 371 U.S. 218 (1962).

The reasons for this are not hard to find. The duty to accommodate is a response to an independent choice of the individual involved, cf. Wallace v. Jaffree, supra, 105

S.Ct. at 2491, n.45, and hence lacks one of the hallmarks of an establishment -- gratuitous efforts by government to advance religious ends, Mueller v. Allen, 103 S.Ct. 3062, 3069 (1983).

Moreover, since neither of Philbrook's proposals imposes any burden on any other employee, Estate of Thornton v. Caldor, supra, does not support petitioners' arguments for a reversal. There the statute required, an "unyielding weighting in favor of Sabbath observers over all other interests," and hence had "a primary effect [of advancing] a particular religious practice." No such unyielding burden is imposed here, either on Philbrook's fellow employees or his employer. Title VII, after all, contains an undue hardship exception (whose applicability here remains open on remand) and is available to protect all forms of religious practices, not just Sabbath observance.

Because there is in this case no credible establishment of religion, it is not necessary to consider what impact the Free Exercise Clause has on the claims asserted by the Board, which is, after all, a public employer, cf. Estate of Thorton v. Caldor, supra, 105 S.Ct. at 2919 (O'Connor, J., concurring).

This Court's decisions establish both that public employees enjoy substantial constitutional protections vis-a-vis the government even in its capacity as an employer, Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Connick v. Myers, 461 U.S. 138 (1983); Wygant v. Bd. of Educ., supra, 54 U.S.L.W. at 4881, n.4, and that the Free Exercise Clause requires a significant degree of accommodation of religious practice by government, see, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972). Those principles, would, of course, further dilute the Board's Establishment Clause claim;

indeed, they might well overshadow it, cf.
Widmar v. Vincent, 454 U.S. 263 (1981).

CONCLUSION

For the reasons stated, the judgment
below, remanding this case for further
fact-finding, should be affirmed.

MT

Marc D. Stern
Counsel of Record
Lois C. Waldman
Ronald A. Krauss
American Jewish
Congress
15 East 84th Street
New York, N.Y. 10028
(212) 879-4500

Jack Novik
Burt Neuborne
American Civil Liberties
Union
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

June, 1986